TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No[redacted] 188

H. P. TRUSLER, PLAINTIFF IN ERROR,

vs.

NOAH CROOKS AND NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED [illegible]

([illegible])

(30,659)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 694

H. P. TRUSLER, PLAINTIFF IN ERROR,

vs.

NOAH CROOKS AND NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. "a"] CITATION—In usual form, showing service on C. C. Madison; filed Sept. 13, 1924; omitted in printing

[fol. "b"] UNITED STATES OF AMERICA, set:

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR AND RETURN—Filed Sept. 13, 1924

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the April Term, 1924, thereof, between H. P. Trusler and Noah Crooks, and Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri, a manifest error hath happened, to the great damage of the said —— ——, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 13th day of October, 1924, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court.

Issued at office in Kansas City, this 13th day of September, in the year of our Lord one thousand nine hundred twenty-four.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy Clerk.
(Seal of the United States District Court, Western District of Missouri, Western Division.)

Allowed by Albert L. Reeves, Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, set:

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said District Court of the United States for the Western Division of the Western District of Missouri.

Issued at office in Kansas City, this 4th day of October, A. D. 1924.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy Clerk.
(Seal of the United States District Court, Western District of Missouri, Western Division.)

[File endorsement omitted.]

[fol. 1] CAPTION—Omitted

[File endorsement omitted.]

[fol. 2] IN UNITED STATES DISTRICT COURT

At Law. No. 5783

H. P. TRUSLER, Plaintiff,

vs.

NOAH CROOKS and NOAH CROOKS, Collector of Internal Revenue for the Sixth District of Missouri, Defendant

PETITION—Filed Nov. 24, 1923

Plaintiff for his cause of action against defendant says:

1. Plaintiff is and at all times herein mentioned was a citizen, resident and inhabitant of the State of Kansas, residing at Emporia in the county of Lyon in said state.

2. The defendant Noah Crooks is and at all times herein mentioned was the duly appointed qualified and acting Collector of Internal Revenue in and for the Sixth District of Missouri, and is a citizen, resident and inhabitant of the Western District of Missouri.

3. The plaintiff is engaged in the grain business, in the city of Emporia, Kansas and for several years last past has handled or caused to be handled large quantities of grain and contracts for the sale of grain, including contracts for the purchase and sale of what are commonly known as indemnities, as hereinafter more fully defined, explained and set forth.

4. That on or about the 23rd day of October, 1923, plaintiff who is a member of The Board of Trade of the city of Chicago, made, executed and delivered a privilege or option for a contract for the

[fol. 3] sale of grain in the form commonly known as an indemnity, whereby the plaintiff agreed and offered to sell one thousand bushels of contract grade wheat to be delivered in stock at regular warehouses under the rules of the said Board of Trade of the city of Chicago at a price fixed in said agreement, and subject to acceptance until the closing hour for regular trading on said Board of Trade on the following day, and plaintiff paid thereon a tax of Two Hundred ($200.00) Dollars by affixing to the said contract or agreement Internal Revenue stamps issued by the United States for that purpose, in the sum of Two Hundred ($200.00) Dollars which were purchased by the plaintiff from the defendant and for which plaintiff paid the defendant, as Collector of Internal Revenue in and for the Sixth District of Missouri the sum of Two Hundred ($200.00) Dollars: that before purchasing said stamps plaintiff informed the defendant that said stamps were being purchased for the purpose of using them in the payment of the tax of Two Hundred ($200.00) Dollars imposed by Section 3 of the Future Trading Act approved August 24th, 1921, and further informed said defendant that he claimed that said section of said Act was unconstitutional and void and that said tax was therefore illegal and that he proposed and intended to institute an action to recover back the sum so paid for said stamps, and said payment was made under protest and duress, and under compulsion by reason of the penalties and punishment provided in said Act for violation thereof and for failure to pay the tax therein provided.

5. That thereafter plaintiff duly appealed to the Commissioner of Internal Revenue of the United States for the refund of said tax of Two Hundred ($200.00) Dollars on the ground that said tax was illegally imposed and collected and that said section of said Act was unconstitutional and void, which appeal was decided by the said Commissioner of Internal Revenue against the claim of plain-[fol. 4] tiff; a true copy of said decision and rejection is attached hereto, marked Exhibit "A" and made a part hereof.

6. For many years prior to the 24th day of August, 1921, members of grain exchanges throughout the United States had bought and sold in large quantities agreements for contracts for the purchase and sale of grain, subject to acceptance within a definite length of time thereafter, and at a price specified therein, which agreements for contracts were commonly known under the name of "indemnities," and are the same contracts and agreements referred to in said Future Trading Act as "indemnities," "privileges," "bids," "offers," "puts and calls," or "ups and downs." Such forms of contract consist of agreements to sell and agreements to purchase; an agreement to sell is commonly known as an "Offer made subject to deferred acceptance," and an agreement to purchase is commonly known as a "Bid made subject to deferred acceptance." The form customarily and usually employed and used in respect to such transactions, when the agreement is with reference to a purchase of grain is attached hereto, marked Exhibit "B," and made a part hereof; the

form usually used when the agreement is with reference to a sale of grain is attached hereto, marked Exhibit "C" and made a part hereof; the form used by the opposite party to the transaction, when the agreement is with reference to a purchase is attached hereto, marked Exhibit "D" and made a part hereof, and the form used by the opposite party when the agreement is with reference to a sale of grain is attached hereto, marked Exhibit "E" and made a part hereof. When the market reaches the figure named in such an agreement and the purchaser of the indemnity elects to exercise his rights, the amount of grain called for in such agreement is bought or sold, as the case may be, on the exchange named in the agreement, [fol. 5] for future delivery in the month named in the agreement, and thereby the agreement is fully consummated.

7. The purchaser of such an indemnity does not buy or sell the grain covered thereby, but merely buys an agreement for the purchase or sale of such grain at the price stated in such agreement, with the right to accept such offer within the time specified therein; neither does the seller of such contract of indemnity buy or sell the grain in the first instance, but merely agrees to buy or sell the grain subject to acceptance by the person to whom the offer or bid is made; by far the largest percentage of such agreements have been made subject to acceptance by the close of market on the following day, at a price within a fraction of a cent per bushel of the close of the day's market; the uniform consideration or price paid for such contracts was on August 24th, 1921 and for many years prior thereto had been, One ($1.00) Dollar per thousand bushels; the consideration, therefore, for such contracts, when measured by the quantity of grain which may be transferred thereunder was one-tenth of one cent for each bushel of grain referred to in said contracts, and the tax imposed thereon by said Act was twenty cents per bushel, or two hundred times the entire consideration paid to the seller under the contract. The amount of this purported tax is so great that it is in fact a penalty which absolutely prevents dealing in such indemnity contracts, and on information and belief plaintiff alleges that no tax under said Section 3 of said Future Trading Act has ever been collected other than the tax paid by plaintiff as aforesaid; and plaintiff further says that the Secretary of the Treasury has never prescribed, issued or published any regulations for the collection or payment of said purported tax as provided for by Section 7 of said Act.

[fol. 6] 8. Contracts subject to acceptance for a longer period than the close of regular trading hours on the following day were also made in lesser quantities prior to the said 24th day of August, 1921, generally for a period of the calendar week and at a price within two (2¢) cents to five (5¢) cents per bushel of the current market, and the consideration for such contracts was likewise One ($1.00) Dollar per thousand bushels; contracts for longer periods were also sometimes sold but the volume of such contracts constituted but a small percentage of the total trade.

9. These contracts of indemnity perform useful, necessary, proper and legitimate functions in connection with the merchandising of grain, and are principally used for such purposes and in such connection; among the principal functions of such contracts are the following: prior to August 24, 1921 dealers in cash grain and millers and dealers in flour frequently made what are known as "firm offers" to buy or sell, which offers are generally good until the close of the market on the following day; indemnities could formerly be purchased giving the right to such dealer or miiler to sell or buy a corresponding quantity of grain at any time before the close of the market on the following day; in this manner the dealer was protected against any loss beyond a nominal sum of a fraction of a cent per bushel in case the market showed an adverse fluctuation at or after its opening on the following day; this permitted operations to be carried on with safety on a broader scale and a narrower margin of profit than is now practicable. In grain futures transactions the dealer could, by purchasing indemnities, carry his trades to the close of the market on the day named for the expiration of the contract of indemnity and would be protected against more than nominal loss regardless of the fluctuations of the market.

[fol. 7] 10. The purpose and intent of said Act is penal and regulatory and is not that of raising revenue for the purposes and within the powers of the Congress of the United States as herein elsewhere set forth, and the purported tax imposed by Section 3 is part of the general plan and purpose further evidenced by the purported tax imposed by Section 4 of said Act and the regulatory provisions dependent thereon, as set forth more particularly in Sections 5, 6, 8, 9 and 10 of said Act, in that contracts of the character described and specified in Section 3 of said Act can be carried out only through and by members of exchanges upon which sales for future delivery are made, which are attempted to be regulated in said Act, and thus and thereby the business carried on upon exchanges is and has been greatly curtailed and diminished, resulting in a large decrease in the business of members of grain exchanges throughout the United States, both as regards those grain exchanges coming within the description of contract markets, as embodied in said bill, and those grain exchanges which, by reason of their local character and small volume of trading could not in any event be designated as contract markets, and the business of the plaintiff, though located at Emporia, Kansas, which has no grain exchange, and where the grain business handled is and has been largely of a local and intrastate character, has been greatly reduced and impaired and plaintiff greatly damaged thereby; and plaintiff avers that the business of grain dealers throughout the United States, whose situations and businesses are similar in character to that of the plaintiff have been likewise greatly damaged.

11. Said Section 3 does not purport to limit the application of the [fol. 8] tax to interstate commerce, nor to acts deemed or held to be an obstruction to interstate commerce, nor does it purport to exercise any of the powers of Congress in relation to those transactions com-

monly denominated interstate commerce, and in fact said sale on which plaintiff was compelled to pay said tax of Two Hundred ($200.00) Dollars was a transaction or contract which, if consummated by the election of the other party thereto, would have required only that a purchase of grain for future delivery be made upon the Chicago Board of Trade, and subject to its rules, under which a purchase would have been made upon the exchange of the Board of Trade of the city of Chicago between two members of said exchange, one acting for the buyer and one for the seller, and in which both parties to said contract are required by the rules of said Board of Trade to be personally present, and upon which delivery could only be made by ringing out under the customs or rules of said Board of Trade or by delivery of warehouse receipts covering grain stored in warehouses in the State of Illinois and upon such delivery the grain would have been held in the state of Illinois; that said contract was made between plaintiff, a citizen, resident and inhabitant of Emporia, Kansas, and another citizen and resident of Emporia, Kansas; that when such contract or options for contracts as described and named in said Section 3 of said Act are or were previously made on or with reference to other exchanges they were uniformly made, executed and performed in like manner as above set forth in reference to the said contract and agreement upon which said tax was paid by plaintiff as aforesaid, and were made, executed and performed within the limits of a single state and without the transportation or movement of any grain between the states or into or from foreign countries or otherwise in interstate commerce.

12. That said section 3 is unconstitutional and void for the following reasons, to-wit:

[fol. 9] (a) It is in violation of Section 8 of Article I of the Constitution of the United States and the 10th Amendment of said constitution, in that the purported taxes imposed by said Act have no reasonable relation to the taxing power of the Congress of the United States and are not levied either to pay the debts or provide for the common defense or general welfare of the United States, but for the purpose only of forcing dealers in grain and boards of trade or grain exchanges dealing in grain to submit to regulation by compelling them to desist from dealing in "indemnities," "privileges," "bids," "offers," "puts and calls" and "ups and downs" under compulsion of the extreme and harsh requirement of payment of twenty (20¢) cents per bushel upon such transactions which requirement is in fact a penalty and not a tax, and under compulsion of criminal prosecution as provided in said Act.

(b) Said section violates the 10th amendment to the said Constitution in that it interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states, and likewise interferes with the right of the several states to provide for and regulate the maintenance of grain exchanges within their borders upon which is conducted the making of contracts, which are merely intrastate transactions.

13. That by reason of the premises plaintiff is entitled to recover of and from the defendant the said sum of Two Hundred ($200.00) Dollars so by him paid to the defendant as aforesaid.

Wherefore, plaintiff prays judgment against defendant for said sum of Two Hundred ($200.00) Dollars, together with interest and for his costs in this behalf incurred and expended.

Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.

[fol. 10] EXHIBIT A TO PETITION

Treasury Department

Washington

Office of Commissioner of Internal Revenue

M-DSB.
Cl. 31194. November 16, 1923.

Mr. H. P. Trusler, Emporia, Kansas.

SIR: Your claim for the refunding of $200 paid for future delivery stamps affixed to an agreement to sell 1,000 bushels of wheat for future delivery has been examined.

The instrument in question is an option for a contract to sell such as is specified in Section 3 of the Act approved August 24, 1921, known by the short title of "The Future Trading Act," and is taxable at the rate of 20 cents per bushel.

The tax, therefore, was legally collected and the claim accordingly is hereby rejected.

Respectfully, D. H. Blair, Commmissioner.

[fol. 11] EXHIBIT B TO PETITION

City: ——, State: ——, Date: —— —, ——.

—— ——:

I will give — per bushel, for — bushels of contract grade of — for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——.

This offer is subject to acceptance by you until the closing hour for regular trading on —— —, 19—.

Signature: —— ——.

[fol. 12] EXHIBIT C TO PETITION

City: ——, State: ——, Date: —— —, ——.

—— ——:

I will sell — bushels of contract grade of — at — per bushel for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——.

This offer is subject to acceptance by you until the closing hour for regular trading on —— —, 19—.

Signature: —— ——.

[fol. 13] EXHIBIT D TO PETITION

City: ——, State: ——, Date: —— —, ——.

—— ——:

I have your offer to buy — bushels of contract grade of — at — per bushel for delivery during —— 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——, and subject to my acceptance until the closing hour for regular trading on —— —, 19—.

—— ——.

[fol. 14] EXHIBIT E TO PETITION

City: ——, State: ——, Date: —— —, ——.

—— ——:

I have your offer to buy — bushels of contract grade of — at — per bushel for delivery during —— 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——, and subject to my acceptance until the closing hour for regular trading on —— —, 19—.

—— ——.

[fol. 15] STATE OF MISSOURI,
County of Jackson, ss:

E. R. Morrison, of lawful age, being first duly sworn on oath says that he is attorney and agent for the plaintiff, H. P. Trusler, and makes this affidavit on his behalf, and that the exhibits attached to the foregoing petition and marked Exhibits A, B, C, D and E and each of them are true and correct copies, to the best of the knowledge, information and belief of affiant.

E. R. Morrison.

Subscribed and sworn to before me this — day of November, 1923. Dorothy Putthoff, Notary Public. My commission expires Sept. 20, 1927. (Seal.)

[fol. 16] [File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PETITION—Filed May 10, 1924

(1) Plaintiff for his cause of action against defendant says:

2. The defendant, Noah Crooks, is and at all times herein mentioned was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Sixth District of Missouri, and is a citizen, resident and inhabitant of the Western District of Missouri.

3. That plaintiff is engaged in the grain business, in the city of Emporia, Kansas, and for several years last past has handled or caused to be handled large quantities of grain and contracts for the sale of grain, including contracts for the purchase and sale of what are commonly known as indemnities, as hereinafter more fully defined, explained and set forth.

4. That on or about the 23rd day of October, 1923, plaintiff, who is a member of The Board of Trade of the city of Chicago, made, executed and delivered a privilege or option for a contract for the sale of grain in the form commonly known as an indemnity, whereby the plaintiff agreed and offered to sell one thousand bushels of contract grade wheat to be delivered in stock at regular warehouses under the [fol. 18] rules of the said Board of Trade of the city of Chicago at a price fixed in said agreement, and subject to acceptance until the closing hour for regular trading on said Board of Trade on the following day, and plaintiff paid thereon a tax of Two Hundred ($200.00) Dollars by affixing to the said contract or agreement Internal Revenue stamps issued by the United States for that purpose, in the sum of Two Hundred ($200.00) Dollars which were purchased by the plaintiff from the defendant and for which plaintiff paid the defendant, as Collector of Internal Revenue in and for the Sixth District of Missouri, the sum of Two Hundred ($200.00) Dallars; that before purchasing said stamps plaintiff informed the defendant that said stamps were being purchased for the purpose of using them in the payment of the tax of Two Hundred ($200.00) Dollars imposed by Section 3 of the Future Trading Act approved August 24, 1921, and further informed said defendant that he claimed that said section of said Act was unconstitutional and void and that said tax was therefore illegal and that he proposed and intended to institute

an action to recover back the sum so paid for said stamps, and said payment was made under protest and duress, and under compulsion by reason of the penalties and punishment provided in said Act for violation thereof and for failure to pay the tax therein provided.

5. That thereafter plaintiff duly appealed to the Commissioner of Internal Revenue of the United States for the refund of said tax of Two Hundred ($200.00) on the ground that said tax was illegally imposed and collected and that said section of said Act was unconstitutional and void, which appeal was decided by the said Commissioner of Internal Revenue against the claim of plaintiff; a true copy of said decision and rejection is attached hereto, marked Exhibit "A" and made a part hereof.

6. For many years prior to the 24th day of August, 1921, members of grain exchanges throughout the United States had bought and [fol. 19] sold in large quantities agreements for contracts for the purchase and sale of grain, subject to acceptance within a definite length of time thereafter, and at a price specified therein, which agreements for contracts were commonly known under the name of "indemnities," and are the same contracts and agreements referred to in said Future Trading Act as "indemnities," "privileges," "bids," "offers," "put and calls," or "up and downs." Such forms of contract consist of agreements to sell and agreements to purchase; an agreement to sell is commonly known as an "Offer made subject to deferred acceptance," and an agreement to purchase is commonly known as a "Bid made subject to deferred acceptance." The form customarily and usually employed and used in respect to such transactions, when the agreement is with reference to a purchase of grain is attached hereto, marked Exhibit "B", and made a part hereof; the form usually used when the agreement is with reference to a sale of grain is attached hereto, marked Exhibit "C" and made a part hereof; the form used by the opposite party to the transaction, when the agreement is with reference to a purchase is attached hereto, marked Exhibit "D" and made a part hereof, and the form used by the opposite party when the agreement is with reference to a sale of grain is attached hereto, marked Exhibit "E" and made a part hereof. When the market reaches the figure named in such an agreement and the purchaser of the indemnity elects to exercise his rights, the amount of grain called for in such agreement is bought or sold, as the case may be, on the exchange named in the agreement, for future delivery in the month named in the agreement, and thereby the agreement is fully consummated.

7. The purchaser of such an indemnity does not buy or sell the grain covered thereby, but merely buys an agreement for the purchase or sale of such grain at the price stated in such agreement, with the right to accept such offer within the time specified therein; [fol. 20] neither does the seller of such contract of indemnity buy or sell the grain in the first instance, but merely agrees to buy or sell the grain subject to acceptance by the person to whom the offer or bid is made; by far the largest percentage of such agreements

have been made subject to acceptance by the close of market on the following day, at a price within a fraction of a cent per bushel of the close of the day's market; the uniform consideration or price paid for such contracts was on August 24, 1921, and for many years prior thereto had been, One ($1.00) Dollar per thousand bushels; the consideration, therefore, for such contracts, when measured by the quantity of grain which may be transferred thereunder was one-tenth of one cent for each bushel of grain referred to in said contracts, and the tax imposed thereon by said Act was twenty cents per bushel, or two hundred times the entire consideration paid to the seller under the contract. The amount of this purported tax is so great that it is in fact a penalty which absolutely prevents and has prevented dealing in such indemnity contracts.

8. Contracts subject to acceptance for a longer period than the close of regular trading hours on the following day were also made in lesser quantities prior to the said 24th day of August, 1921, generally for a period of the calendar week and at a price within two (2¢) cents to five (5¢) cents per bushel of the current market, and the consideration for such contracts was likewise One ($1.00) Dollar per thousand bushels; contracts for longer periods were also sometimes sold but the volume of such contracts constituted but a small percentage of the total trade.

9. The purpose and intent of said Act is penal and regulatory and is not that of raising revenue for the purposes and within the powers of the Congress of the United States as herein elsewhere set [fol. 21] forth, and the purported tax imposed by Section 3 is part of the general plan and purpose further evidenced by the purported tax imposed by Section 4 of said Act and the regulatory provisions dependent thereon, as set forth more particularly in Sections 5, 6, 8, 9 and 10 of said Act, in that contracts of the character described and specified in Section 3 of said Act can be carried out only through and by members of exchanges upon which sales for future delivery are made, and which exchanges are attempted to be regulated in said Act, and the business carried on upon such exchanges is and has been thereby greatly curtailed and diminished.

10. Said Section 3 does not purport to limit the application of the tax to interstate commerce, nor to acts deemed or held to be an obstruction to interstate commerce, nor does it purport to exercise any of the powers of Congress in relation to those transactions commonly denominated interstate commerce, and in fact said sale on yhich plaintiff was compelled to pay said tax of Two Hundred ($200.00) Dollars was a transaction or contract which, if consummated by the election of the other party thereto, would have required only that a purchase of grain for future delivery be made upon the Chicago Board of Trade, and subject to its rules, under which a purchase would have been made upon the exchange of the Board of Trade of the city of Chicago between two members of said exchange, one acting for the buyer and one for the seller, and in which both parties to said contract are required by the rules

of said Board of Trade to be personally present, and upon which delivery could only be made by ringing out under the customs or rules of said Board of Trade or by delivery of warehouse receipts covering grain stored in warehouses in the State of Illinois and upon such delivery the grain would have been held in the State of Illinois; that said contract was made between plaintiff, a citizen, resident and inhabitant of Emporia, Kansas, and another citizen [fol. 22] and resident of Emporia, Kansas; that when such contract or options for contracts as described and named in said Section 3 of said Act are or were previously made on or with reference to other exchanges they were uniformly made, executed and performed in like manner as above set forth in reference to the said contract and agreement upon which said tax was paid by plaintiff as aforesaid.

11. That said section 3 i*n* unconstitutional and void for the following reasons, to-wit:

(a) It is in violation of Section 8 of Article I of the Constitution of the United States and the 10th Amendment of said constitution, in that the purported taxes imposed by said Act have no reasonable relation to the taxing power of the Congress of the United States and are not levied either to pay the debts or provide for the common defence or general welfare of the United States, but for the purpose only of forcing dealers in grain and boards of trade or grain exchanges dealing in grain to submit to regulation by compelling them to desist from dealing in 'indemnities", "privileges", "bids", "offers", "puts and calls" and "ups and downs" under compulsion of the extreme and harsh requirement of payment of twenty (20¢) per bushel upon such transactions which requirement is in fact a penalty and not a tax, and under compulsion of criminal prosecution as provided in said Act.

(b) Said section violates the 10th amendment to the said Constitution in that it interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states, and likewise interferes with the right of the several states to provide for and regulate the maintenance of grain exchanges within their borders upon which is conducted the making of contracts, which are merely intrastate transactions.

13. That by reason of the premises plaintiff is entitled to recover of and from the defendant the said sum of Two Hundred ($200.00) [fol. 23] Dollars so by him paid to the defendant as aforesaid.

Wherefore, plaintiff prays judgment against defendant for said sum of Two Hundred ($200.00) Dollars, together with interest, and for his costs in this behalf incurred and expended.

Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.

[fol. 24] Exhibit A to Amended Petition—Omitted; printed side page 10 ante

[fol. 25] EXHIBIT B TO AMENDED PETITION—Omitted; printed side page 11 ante

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[fol. 26] EXHIBIT C TO AMENDED PETITION—Omitted, printed side page 12 ante

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[fol. 27] EXHIBIT D TO AMENDED PETITION—Omitted; printed side page 13 ante

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[fols. 28-29] EXHIBIT E TO AMENDED PETITION—Omitted; printed side page 14 ante

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[fol. 30] [File endorsement omitted]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 27, 1924

Now on this day comes defendant and for answer to the Petition of Plaintiff herein denies each and every allegation thereof, and asks to be hence dismissed with his costs in this behalf expended.

C. C. Madison, United States Attorney, Attorney for Defendant.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBMISSION

Now on this day there is filed herein an agreed statement of facts, and this cause coming on for hearing, a jury being waived, the same is submitted to the Court, and by the Court taken under advisement.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed June 6, 1924

It is agreed between plaintiff and the defendant that for the purpose of the trial of this cause, the following facts are agreed upon by the parties, both plaintiff and defendant, and that a jury is hereby waived by the plaintiff and the defendant and the cause submitted to the court on said statement as follows:

1. Plaintiff is and at all times mentioned in the petition was a citizen, resident and inhabitant of the State of Kansas, residing at Emporia in the County of Lyon in said state.

2. The defendant, Noah Crooks, is and at all times mentioned in the petition was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Sixth District of Missouri, and is a citizen, resident and inhabitant of the Western District of Missouri.

3. That plaintiff is engaged in the grain business in the city of Emporia, Kansas, and for several years last past has handled or caused to be handled large quantities of grain and contracts for the sale of grain, including contracts for the purchase and sale of what are commonly known as indemnities, as hereinafter more fully defined, explained and set forth.

4. That on or about the 23rd day of October, 1923, plaintiff, who is a member of The Board of Trade of the City of Chicago, in consideration of the sum of one dollar ($1.00) to him paid, made, [fol. 34] executed and delivered a privilege or option for a contract for the sale of grain in the form commonly known as an indemnity, and which said instrument reads as follows, to-wit:

"Emporia, Kansas, October 23, 1923.

R. F. Teichgraeber:

I will sell one thousand bushels of contract grade wheat at $1.11¼ per bushel, for delivery during May, 1924, same to be delivered in regular warehouses under the rules of the Board of Trade of the city of Chicago.

This offer is made subject to acceptance by you until the closing hour for regular trading on October 24, 1923.

H. P. Trusler."

and that the agreement or contract so made, executed, and delivered by the plaintiff was a transaction of the kind known to the trade as "indemnity transactions" and referred to and designated in section 3 of the Future Trading Act approved August 24, 1921, as "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs."

5. The plaintiff paid on said instrument a tax of two hundred dollars ($200.00) by affixing to the said contract or agreement Internal Revenue stamps issued by the United States for that purpose, in the sum of two hundred dollars ($200.00), which were purchased by the plaintiff from the defendant, and for which plaintiff paid the defendant, as Collector of Internal Revenue in and for the Sixth District of Missouri, the sum of two hundred dollars ($200.00); that before purchasing said stamps plaintiff informed the defendant that said stamps were being purchased for the purpose of using them in the payment of the tax of two hundred dollars ($200.00) imposed by Section 3 of the Future Trading Act approved August 24, 1921, and further informed said defendant that he claimed that said section of said act was unconstitutional and void and that said [fol. 35] tax was therefore illegal and that he proposed and intended to institute an action to recover back the sum so paid for said stamps, and said payment was made under protest and duress, and under compulsion by reason of the penalties and punishment provided in said act for violation thereof and for failure to pay the tax therein provided.

6. That thereafter plaintiff duly appealed to the Commissioner of the Internal Revenue of the United States for the refund of said tax of two hundred dollars ($200.00) on the ground that said tax was illegally imposed and collected and that said section of said act was unconstitutional and void, which appeal was decided by the said Commissioner of Internal Revenue against the claim of plaintiff, said decision and rejection being as follows:

"Treasury Department

Washington

Office of Commissioner of Internal Revenue

November 16, 1923.

M-DSB.
C1. 31194.

Mr. H. P. Trusler, Emporia, Kansas.

SIR:

Your claim for the refunding of $200 paid for future delivery stamps affixed to an agreement to sell 1,000 bushels of wheat for future delivery has been examined.

The instrument in question is an option for a contract to sell such as is specified in Section 3 of the Act approved August 24, 1921, known by the short title of "The Future Trading Act," and is taxable at the rate of 20 cents per bushel.

The tax, therefore, was legally collected and the claim accordingly is hereby rejected.

Respectfully, D. H. Blair, Commissioner."

[fol. 36] 7. For many years prior to the 24th day of August, 1921 members of grain exchanges throughout the United States had bought and sold in large quantities agreements for contracts for the purchase and sale of grain, subject to acceptance within a definite length of time thereafter, and at a price specified therein, which agreements for contracts were commonly known under the name of "indemnities," and are the same contracts and agreements referred to in said Future Trading Act as "indemnities," "privileges," "bids," "offers," "puts and calls," or "ups and downs." Such forms of contracts consist of agreements to sell and agreements to purchase; an agreement to sell is commonly known as an "Offer made subject to deferred acceptance," and an agreement to purchase is commonly known as a "Bid made subject to deferred acceptance." The form customarily and usually employed and used in respect to such transactions, when the agreement is with reference to a purchase of grain is as follows:

"——, ——, Date: ——, —, ——.

—— ——:

I will give — per bushel, for — bushels of contract grade of — for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——.

This offer is subject to acceptance by you until the closing hour for regular trading on —— —, 19—.

Signature: —— ——."

The form usually used when the agreement is with reference to a sale of grain is as follows:

"City: ——; State: ——; Date: —— —, ——.

[fol 37] —— ——:

I will sell — bushels of contract grade of — at — per bushel for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——.

This offer is subject to acceptance by you until the closing hour for regular trading on —— —, 19—.

Signature: —— ——."

The form used by the opposite party to the transaction, when the agreement is with reference to a purchase is as follows:

"City: ——; State: ——; Date: —— —, ——.

—— ——:

I have your offer to buy — bushels of contract grade of —, at — per bushel for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of ——, and subject to my acceptance until the closing hour for regular trading on —— —, 19—.

—— ——."

And the form used by the opposite party when the agreement is with reference to a sale of grain is as follows:

"City: ——; State: ——; Date: —— —, ——.

—— ——:

I have your offer to sell — bushels of contract grade of — at — per [fol. 38] bushel for delivery during ——, 19—, same to be delivered in store in regular warehouses under the rules of the Board of Trade of the City of —— and subject to my acceptance until the closing hour for regular trading on —— —, ——.

—— ——."

When the purchaser of the indemnity elects to exercise his rights, the amount of grain called for in such agreement is bought or sold, as the case may be, on the exchange named in the agreement, for future delivery in the month named in the agreement, and thereby the agreement is fully consummated, the grain so bought or sold is not what is commonly known as "cash grain."

8. The purchaser of such an indemnity does not in the first instance buy or sell the grain covered thereby but merely buys an agreement for the purchase or sale of such grain at the price stated in such agreement, with the right to accept such offer within the time specified therein; neither does the seller of such contract of indemnity buy or sell the grain in the first instance, but merely offers to buy or sell the grain subject to acceptance within the time named therein by the person to whom the offer or bid is made; by far the largest percentage of such agreements have been made subject to acceptance by the close of market on the following day, at a price ordinarily within one-fourth to three-fourths of a cen- per bushel of the close of the day's market, although at times of unusually great fluctuations the price named may be as much as one cent, and rare cases as much as two cents, from the closing market price; the uniform consideration or price paid for such contracts was, on August 24, 1921, and for many years prior thereto had been, One Dollar ($1.00) per thousand bushels.

9. Contracts subject to acceptance for a longer period than the close of regular trading hours on the following day were also made [fol. 39] in lesser quantities prior to the said 24th day of August, 1921, generally for a period of the calendar week and at a price within two cents (2¢) to five cents (5¢) per bushel of the current market, and the consideration for such contracts was likewise One Dollar ($1.00) per thousand bushels; contracts for longer periods were also sometimes sold but the volume of such contracts constituted but a small percentage of the total trade.

10. When the purchaser of a contract of the character described and specified in Section 3 of said Act elects to exercise the privilege of option, the transaction can be carried out and performed, and was previous to August 24, 1921, carried out and performed, only through

and by members of those exchanges upon which sales for future delivery were made.

11. The transaction out of which said tax arose was a contract between two citizens of the State of Kansas. If said contract had been consummated by the election of the other party thereto, a purchase of grain for future delivery would have been made upon the Chicago Board of Trade, and subject to its rules, and which purchase would have been made upon the exchange floor of said Board of Trade between two members of said exchange, one acting for the buyer and one for the seller, and in which transaction both parties to said contract are and would be required by the rules of said Board of Trade to be personally present, and upon which delivery could only be made by ringing out under the customs or rules of said Board of Trade or by delivery of warehouse receipts covering grain stored in warehouses in the state of Illinois, and there held for the purchaser.

Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.
C. S. Walden, Spec. Asst. U. S. Atty., Attorney for Defendant.

[fol. 40] [File endorsement omitted]

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Sept. 13, 1924

Now on this 13th day of Sept. 1924, come the parties by their attorneys, a jury having heretofore been waived in writing by the said parties, and the cause having been submitted to the Court on an agreed statement of facts, which has been duly filed and made a part of the record in this case, arguments having been heard and the court being duly advised in the premises finds the issues for the defendants and against the plaintiff, to which plaintiff excepts.

It is therefore ordered and adjudged by the court that the plaintiff recover naught of the defendants and that the defendants go hence without day and recover their costs in this behalf expended.

Albert L. Reeves, Judge.

[fol. 42] [File endorsement omitted]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Sept. 13, 1924

Comes now the plaintiff herein H. P. Trusler and says that on the 13th day of September, 1924, this Court entered judgment herein

in favor of the defendant and against your petitioner in which judgment and the proceedings had prior thereunto in this cause the Constitutionality of Section Three of the Future Trading Act enacted by the Congress of the United States approved August 24, 1921, Chapter 86, 42 Statutes 187 was directly drawn in question and in which said section of said Act was in error adjudged to be constitutional and valid against the claim of this plaintiff that said Section Three was in violation of Section Eight of Article I and the 10th amendment to the Constitution of the United States, which errors and certain errors which will appear more in detail from the assignment of errors which is filed with this petition were committed to the prejudice of this petitioner, and said petitioner, feeling himself aggrieved by the said judgment entered herein as aforesaid, herewith petitions the Court for an order allowing him to prosecute a Writ of Error to the Supreme Court of the United States under the laws of the United States in such cases made and provided.

Wherefore, your petitioner prays that a Writ of Error may issue in this behalf to the Supreme Court of the United States for the correc-[fol. 44] tion of errors so complained of and herewith assigned, and that an order be made fixing the amount of security to be given by the plaintiff in error conditioned as the law directs and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

H. P. Trusler, by E. R. Morrison, Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Sept. 13, 1924

Now comes H. P. Trusler, Plaintiff in error in the above numbered and entitled cause and in connection with his petition for a Writ of Error makes the following Assignments of Error which he avers occurred upon trial thereof and upon which he relies to reverse the judgment entered herein as appears of record, to-wit:

1. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks, Collector of Internal Revenue of the Sixth District of Missouri stamp taxes paid by him under protest, the refund of which had been duly denied by the Commissioner of Internal Revenue, and which stamp taxes were paid under Section 3 of the Future Trading Act approved August 24, 1921, Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates the 10th Amendment to the Constitution of the United States in that it interferes with the right of the several sates to provide for and

regulate the making of contracts with regard to intrastate transactions within the respective states.

2. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks, Collector of Internal Revenue of the Sixth District of Missouri stamp taxes paid by him under protest, the refund of which had been duly denied by the Commissioner of In- [fol. 46] ternal Revenue, and which stamp taxes were paid under Section 3 of the Future Trading Act approved August 24, 1921, Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates the 10th Amendment to the Constitution of the United States in that it interferes with the right of the several states to provide for and regulate the maintenance of grain exchanges within their borders upon which is conducted the making of intrastate contracts.

3. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks, Collector of Internal Revenue of the Sixth District of Missouri stamp taxes paid by him under protest, the refund of which had been duly denied by the Commissioner of Internal Revenue, and which stamp taxes were paid under Section 3 of the Future Trading Act approved August 24, 1921, Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates Section 8 of Article I of the Constitution of the United States and the 10th Amendment to the said Constitution in that the purported taxes imposed by said section of said Act have no reasonable relation to the taxing power of the Congress and are not levied either to pay the debts or provide for the common defense or general welfare of the United States but for the sole purpose of forcing dealers in grain and grain exchanges and their members to submit to regulation by compelling them to desist from dealing in "indemnities" "privileges" "bids" "offers" "puts and calls" and "ups and downs" under the penalties of the extreme and exorbitant purported tax and the criminal prosecution provided in said Act.

4. The Court erred in entering judgment in favor of the defendant Noah Crooks, Collector of Internal Revenue of the Sixth District of Missouri in that the facts stated in the agreed statement of facts upon which the case was submitted, and which stand as special [fol. 47] findings or as a special verdict in the case are insufficient to support the judgment in his favor in that Section 3 of said act is a regulation of intrastate commerce and interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states in violation of the 10th Amendment to the Constitution of the United States.

5. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks stamp taxes paid by him under protest, the refund of which had been duly denied by the Commissioner of Internal Revenue, and which stamp taxes were paid under Section 3 of the Future Trading Act approved August 24, 1921,

Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates the 10th Amendment to the Constitution of the United States in that it interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states.

6. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks, stamp taxes paid by him under protest, the refund of which had been duly denied by the Commissioner of Internal Revenue, and which stamp taxes were paid under Section 3 of the Future Trading Act approved August 24, 1921, Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates the 10th Amendment to the Constitution of the United States in that it interferes with the right of the several states to provide for and regulate the maintenance of grain exchanges within their borders upon which is conducted the making of intrastate contracts.

7. The Court erred in holding that plaintiff could not recover from the defendant Noah Crooks, stamp taxes paid by him under protest the refund of which had been duly denied by the Commissioner of Internal Revenue, and which stamp taxes were paid under Section 3 [fol. 48] of the Future Trading Act approved August 24, 1921, Chap. 86, 42 Stat. 187, against the claim of this plaintiff that said Section 3 violates Section 8 of Article I of the Constitution of the United States and the 10th Amendment to the said Constitution in that the purported taxes imposed by said section of said Act have no reasonable relation to the taxing power of the Congress and are not levied either to pay the debts or provide for the common defense or general welfare of the United States but for the sole purpose of forcing dealers in grain and grain exchanges and their members to submit to regulation by compelling them to desist from dealing in "indemnities" "privileges" "bids" "offers" "puts and calls" and "ups and downs" under the penalties of the extreme and exorbitant purported tax and the criminal prosecution provided in said Act.

8. The Court erred in entering judgment in favor of the defendant Noah Crooks in that the facts stated in the agreed statement of facts upon which the case was submitted, and which stand as special findings or as a special verdict in the case are insufficient to support the judgment in his favor in that Section 3 of said act is a regulation of intrastate commerce and interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states in violation of the 10th Amendment to the Constitution of the United States.

9. The Court erred in entering judgment against the plaintiff in that the facts found are insufficient to support the judgment.

10. The Court erred in entering judgment against the plaintiff in that the facts stated in the agreed statement of facts are insufficient to support the judgment.

11. The Court erred in refusing to enter judgment for the plaintiff under the agreed statement of facts on the ground that said sec-
[fol. 49] tion of said act was unconstitutional and void and constituted a regulation of intrastate commerce.

12. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:—
"Plaintiffs right of recovery is denied on the sole ground that Section 3 of the Future Trading Act is constitutional and valid."

13. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:—
"The Section under which the plaintiff paid the tax in question does not violate the provisions of the Tenth Amendment to the Constitution of the United States."

14. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:—
"Said Section 3 of said Act does not violate the provisions of Section 8 of Article I of the Constitution of the United States."

15. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:
"Although the tax on the transaction of the character described in the plaintiff's petition is two hundred times the amount involved in the transaction itself so that the act is obviously absolutely prohibitive nevertheless it must be held to be valid under the taxing power and is not violative of the Tenth Amdnement to the Constitution of the United States."

16. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:—
"The Court declares the law to be that in view of the provisions
[fol. 50] of Section 11 of the Act in question, the Court must look to the provisions of Section 3 alone in determining whether or not it is regulatory."

17. The Court erred in giving of its own motion and over the exception of the plaintiff the following declaration of law:—
"The Court declares as a matter of law that under the agreed statement of facts in this case Section 3 is not penal or regulatory in its nature."

18. The Court erred in refusing to give, upon the request of the plaintiff, the following declaration of law:—

"A purported taxing act enacted by Congress which exacts a tax which would ordinarily amount to a tax of $200.00 on a transaction involving a consideration of $1.00 and which would therefore be a tax of 20,000% and which would be a minimum tax of $40.00 on each $1.00 involved or a minimum of 4,000% is so exorbitant as to show that such a purported tax is a penalty and not a tax and that it is not within the powers granted to Congress under Section 8 of Article I of the Constitution of the United States and that it is viola-

tive of the Tenth Amendment to the Constitution of the United States when the direct result of such legislation is to prohibit lawful commerce within the borders of the several states between citizens of the same state."

19. The Court erred in refusing to give, upon the request of the plaintiff, the following declaration of law:—

"The Court declares as a matter of law that Section 3 of the Act in question is obviously intended to regulate grain dealers and dealings on grain exchanges by preventing and prohibiting the making of contracts of the character specified in said Section and it is therefore a direct interference with the police power of the several states which is prohibited under the Tenth Amendment of the Constitution of the United States and said Section is a penalty and not a tax and is therefore invalid."

[fol. 51] Wherefore plaintiff in error prays that the judgment of the District Court may be reversed.

E. R. Morrison, Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.

[fol. 52] [File endorsement omitted]

[fols. 53 & 54] In United States District Court

[Title omitted]

Order Allowing Writ of Error—Filed Sept. 13, 1924

On this 13th day of Sept., 1924, came plaintiff H. P. Trusler, by Morrison, Nugent, Wylder & Berger, his attorneys and filed herein and presented to this Court his petition praying for the allowance of a Writ of Error and filed herein an assignment of errors intending to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as will be proper in the premises and that the amount of the bond for costs may be determined.

Now, upon consideration whereof, the Court does allow the Writ of Error upon the plaintiff giving bond according to law in the sum of Two Hundred and Fifty Dollars ($250.00).

Albert L. Reeves, Judge.

[fols. 55 & 56] Bond on Writ of Error for $250—Approved and filed Sept. 13, 1924; omitted in printing

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed Sept. 13, 1924

Be it remembered that on this day, to-wit, the 6th day of June, 1924, being one of the days of the April, 1924, term of this court, the above-entitled cause coming on for trial before the Honorable A. L. Reeves, Judge of this court, and the parties both plaintiff and defendant having filed herein a written waiver of the right to trial by jury, and having filed and made a part of the record in this cause an agreed statement of facts, the parties announcing ready for trial, the following proceedings were had:

Appearances: For the plaintiff, Mr. E. R. Morrison; for the defendant, Mr. C. T. Hendler of Washington, D. C., and Hon. C. C. Madison, United States District Attorney for the Western District of Missouri.

The cause was submitted to the Court upon the amended petition and the answer thereto and upon the written statement of facts and the written stipulation submitting the cause to the court thereon.

And thereupon, the court having examined the pleadings and the said agreed statement of facts and having listened to the arguments of counsel, the cause was taken under advisement.

[fol. 58] And thereafter and on the 13th day of September, 1924, the same being one of the regular days of the April, 1924, term of the above court, the court gave of its own motion the following declarations of law:

1. Plaintiff's right of recovery is denied on the sole ground that Section 3 of the Future Trading Act is constitutional and valid.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

2. The section under which the plaintiff paid the tax in question does not violate the provisions of the Tenth Amendment to the Constitution of the United States.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

3. Said Section 3 of said Act does not violate the provisions of Section 8 of Article I of the Constitution of the United States.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

4. Although the tax on the transaction of the character described in the plaintiff's petition is two hundred times the amount involved in the transaction itself so that the Act is obviously absolutely prohibitive nevertheless it must be held to be valid under the taxing power and is not violative of the Tenth Amendment to the Constitution of the United States.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

5. The Court declares the law to be that in view of the provisions of Section 11 of the Act in question, the Court must look to the provisions of Section 3 alone in determining whether or not it is regulatory.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

[fol. 59] 6. The Court declares as a matter of law that under the agreed statement of facts in this case Section 3 is not penal or regulatory in its nature.

To which declaration of law the plaintiff by counsel then and there at the time duly excepted and still excepts.

And thereupon plaintiff by counsel requested the court to give the following declarations of law:

1. A purported taxing act enacted by Congress which exacts a tax which would ordinarily amount to a tax of $200.00 on a transaction involving a consideration of $1.00 and which would therefore be a tax of 20,000% and which would be a minimum tax of $40.00 on each $1.00 involved or a minimum of 4,000% is so exorbitant as to show that such a purported tax is a penalty and not a tax and that it is not within the powers granted to Congress under Section 8 of Article I of the Constitution of the United States and that it is violative of the Tenth Amendment to the Constitution of the United States when the direct result of such legislation is to prohibit lawful commerce within the borders of the several states between citizens of the same state.

Which declaration of law the court then and there at the time refused, to which action and ruling of the court in so refusing to give said declaration of law plaintiff by counsel then and there at the time duly excepted and still excepts.

2. The Court declares as a matter of law that Section 3 of the Act in question is obviously intended to regulate grain dealers and dealings on grain exchanges by preventing and prohibiting the making of contracts of the character specified in said section and it is therefore a direct interference with the police power of the several states which is prohibited under the Tenth Amendment of the Constitution of the United States and said section is a penalty and not a tax and is therefore invalid.

[fol. 60] Which declaration of law the court then and there at the time refused, to which action and ruling of the court in so refusing to give said declaration of law plaintiff by counsel then and there at the time duly excepted and still excepts.

And thereupon the court entered judgment against the plaintiff and for the defendants.

The above and foregoing bill of exceptions contains all of the evidence introduced at the trial of said cause, all of the rulings of

the court, all of the exceptions allowed, all of the instructions given and refused, and each and every matter therein contained is true and correct and the same is hereby signed, sealed, certified to and allowed as a ful, true and complete bill of exceptions in and for said cause; and it is ordered to be filed as a record therein and it is hereby made a part of the records in said cause this 13th day of September, 1924.

Albert L. Reeves, United States District Judge who presided at the trial of said cause.

[fols. 61 & 62] In United States District Court

[Title omitted]

Præcipe for Transcript—Filed Sept. 13, 1924

To E. R. Durham, Clerk of the United States District Court for the Western Division of the Western District of Missouri:

Please prepare transcript in the above entitled case for filing in the Supreme Court of the United States and include in the same the following:

1. Petition.
2. Amended Petition.
3. Answer.
4. Agreed statement of facts.
5. Memorandum opinion of the Court.
6. Judgment.
7. All record entries.
8. Petition for Writ of Error.
9. Assignment of Errors.
10. Order allowing Writ of Error and fixing the amount of bond.
11. Bond on Writ of Error.
12. Clerk's certificate of Transcript of record.
13. Writ of Error.
14. Clerk's return on Writ of Error.
15. Citation.
16. Præcipe for Transcript.
17. Bill of Exceptions.

E. R. Morrison, Morrison, Nugent, Wylder & Berger, Attorneys for Plaintiff.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

This is an action at law against the Collector of Internal Revenue for the Sixth District of Missouri to recover the sum of Two Hundred ($200) Dollars in taxes heretofore paid under protest.

The tax was exacted upon a written contract executed by the plaintiff October 23, 1923. By the terms of said contract, in consideration of One ($1) Dollar, plaintiff granted a privilege or option for a contract for the sale of grain in the form commonly known as an "indemnity." He was a member of the Board of Trade of the City of Chicago, but a citizen and resident of Emporia in the State of Kansas. The tax was paid by affixing to the written instrument Internal Revenue Stamps issued by and bought of the United States for that purpose. Plaintiff had purchased said stamps for which he paid in cash Two Hundred ($200) Dollars. He preserved all his rights by informing the Collector of the purpose for which said purchase was being made, challenging the constitutionality of the law under which said requirement was made, and making the payment under protest.

The Statute, under the provisions of which the tax imposed, is Section 3 of an Act of August 24th, 1921, 42 Statutes at Large 187, and is known as "The Future Trading Act." It is entitled "an Act [fol. 64] taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of Boards of Trade, and for other purposes." Section 3 is as follows:

"That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as 'privileges,' 'bids,' 'offers,' 'puts and calls,' 'indemnities,' or 'ups and downs.' "

Section 4 of said Act has heretofore been held unconstitutional, Hill v. Wallace, 259 U. S. 44.

Section 11 of said Act, however, provides "that if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby." Moreover, it was specifically held in the Wallace case, supra, that said Section 3, with other provisions of the Act was not affected by the conclusion reached in that case. In fact the court said, after quoting Section 3 and in reference thereto: "This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling

or offer full opportunity for it and does not seem to be associated with Section 4. Such a tax without more would seem to be within the congressional power."

Plaintiff challenges the constitutionality of said Section 3 upon the grounds that it is violative of Section 8 Article 1 of the National Constitution and also violative of the Tenth Amendment to that in- [fol. 65] strument. Pertinent provisions of Section 8, Article 1 of the Constitution of the United States provides that "The Congress shall have power to lay and collect taxes * * * and excises to pay the debts and provide for the common defense and general welfare of the United States; but all * * * excises shall be uniform throughout the United States."

The Tenth Amendment to the Constitution is a reservation of all power to the states not specifically delegated to the United States by the Constitution.

Memorandum Opinion

1. The power of Congress to levy and collect taxes, duties, imposts and excises is beyond question and need not be discussed here. The judiciary can place no restraint upon this power, even though the taxes imposed may be onerous, burdensome and prohibitive. (Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, l. c. 156; Alaska Fish Co. v. Smith, 255 U. S. 44, l. c. 48; Rast v. Van Deman & Lewis, 240 U. S. 342, l. c. 366; McCray v. United States, 195 U. S. 27, l. c. 54.)

2. It is urged by able counsel for the plaintiff that the tax in the instant case is a penalty and not a tax. This contention cannot be sustained, as the penalties referred to by counsel attach to that legislation where the Congress has mistakenly endeavored to regulate business clearly within state control and to enforce such regulations by the imposition of a tax. Such was the situation in the Child Labor Tax case, 259 U. S. 20, also Hill v. Wallace, supra. In the latter case, Section 4 of the Act under observation sought to impose a tax but such tax was so interwoven with regulations as to give it the aspect of a penalty for failure to observe such regulations rather than a tax.

In the instant case, Section 3, provides for the imposition of a tax without regard to regulations and such tax meets the requirements of uniformity. It is in compliance with and not violative of the [fol. 66] Constitution and its enactment is the exercise of a power clearly conferred upon the Congress by the Constitution.

The imposition of the tax was a valid levy and recovery cannot be had.

Kansas City, Missouri, July 30th, 1924.

Albert L. Reeves, United States District Judge.

[fol. 67] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, set:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete copy of the Record, Bill of Exceptions, Assignments of Error and all proceedings in the cause wherein H. P. Trusler is plaintiff and Noah Crooks, and Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri, is defendant, as fully as the same appears on file and of record in my office, in compliance with præcipe filed herein and made a part hereof.

I further certify that the original Citation and Writ of Error are prefixed hereto and returned herewith.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 4th day of October, A. D. 1924.

Edwin R. Durham, Clerk U. S. District Court, by H. C. Spaulding, Deputy Clerk. (Seal of United States District Court of Missouri.)

Endorsed on cover: File No. 30,659. W. Missouri, D. C. U. S. Term No. 694. H. P. Trusler, plaintiff in error, vs. Noah Crooks and Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri. Filed October 13th, 1924. File No. 30,659.

(15)

No. [redacted]188

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

H. P. TRUSLER, PLAINTIFF IN ERROR,

VS.

NOAH CROOKS AND NOAH CBOOKS, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI, DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

E. E. Morrison,
Counsel for Plaintiff in Error.

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STATEMENT.

This is an action involving the constitutionality of Section 3 of the act of Congress known as "The Future Trading Act," approved August 24, 1921, Chap. 86, 42 Stat. 187, which imposed a tax of 20 cents per bushel on each bushel involved in transactions known as "privileges," "bids," "offers," "puts and calls," "indemnities" or "ups and downs."

This Act is printed in full in the appendix to this brief.

Plaintiff in error sued to recover two hundred dollars stamp tax paid under protest upon a transaction of the character described in said section. The case was submitted on an agreed statement of facts (R. 14-18), and judgment was rendered for the defendants in error on September 13, 1924 (R. 18).

The opinion of the court below is officially reported in 300 Fed. 996.

Grounds of Jurisdiction.

The specific claim was advanced in the petition that said Section 3 is unconstitutional and void because it is in violation of Section 8 of Article I of the Constitution of the United States and the Tenth Amendment thereto, and that the purported taxes proposed by the act have no reasonable relation to the taxing power of the Congress of the United States and are not levied either to pay the debts or provide for the common defense or general welfare of the United States but constitute a penalty and are in violation of the Tenth Amendment to the Constitution in that it interferes with the right of the several states to regulate the making of contracts with regard to intrastate transactions within the respective states (R. 6); and at the trial plaintiff in error claimed and asked the court to declare said Section 3 to be invalid on the grounds stated above, which declarations the court refused to give and the plaintiff in error excepted (R. 25).

The court of its own motion gave declarations of law over the exception of the plaintiff in error as follows:

1. Plaintiff's right of recovery is denied on the sole ground that Section 3 of the Future Trading Act is constitutional and valid.

2. The section under which the plaintiff paid the tax in question does not violate the provisions of the Tenth Amendment to the Constitution of the United States.

3. Said Section 3 of said act does not violate the provisions of Section 8 of Article I of the Constitution of the United States.

4. Although the tax on the transaction of the character described in the plaintiff's petition is two hundred times the amount involved in the transaction itself so that the act is obviously absolutely prohibitive nevertheless it must be held to be valid under the taxing power and is not violative of the Tenth Amendment to the Constitution of the United States (R. 24).

The jurisdiction of the Supreme Court herein is invoked under Section 238, Judicial Code, Act of January 28, 1915, C. 22, 38 Stat. 804, and such jurisdiction is believed to be sustained by the following authorities:

Downes v. *Bidwell*, 182 U. S. 244; 45 L. Ed. 1088.

Horner v. *U. S.*, 143 U. S. 570; 36 L. Ed. 266; 12 Sup. Ct. Rep. 522.

Nishimura Ekiu v. *U. S.*, 142 U. S. 651; 35 L. Ed. 1146; 12 Sup. Ct. Rep. 336.

THE FACTS.

In substance the facts as shown in the agreed statement of facts are as follows:

Plaintiff in error was a citizen, resident and inhabitant of the State of Kansas at the time of the transaction in question (R. 14), and the transaction was between two citizens of the State of Kansas (R. 18).

The defendant in error, Noah Crooks, is and at all times mentioned in the petition was Collector of Internal Revenue for the Sixth District of Missouri, and a citizen, resident and inhabitant of the Western District of Missouri.

Plaintiff in error is a grain dealer in the city of Emporia, Kansas, and for several years had handled large quantities of grain and contracts for the sale of grain, including contracts for the purchase and sale of what are commonly known as "indemnities" or contracts of the character referred to in said Section 3 (R. 14). On October 23, 1923, plaintiff in error, who is a member of the Board of Trade of the city of Chicago, in consideration of the sum of one dollar paid to him, made, executed and delivered a privilege or option for a contract for the sale of grain in the form commonly known as an "indemnity," which instrument reads as follows:

"Emporia, Kansas, October, 23, 1923.

R. F. Teichgraeber:

I will sell one thousand bushels of contract grade wheat at $1.11¼ per bushel, for delivery dur-

ing May, 1924, same to be delivered in regular warehouses under the rules of the Board of Trade of the City of Chicago.

This offer is made subject to acceptance by you until the closing hour for regular trading on October 24, 1923.

(R. 14) H. P. Trusler."

It was stipulated by the agreed statement of facts that said contract was a transaction of the kind known to the trade as "indemnity transactions" and referred to and designated in Section 3 of the Future Trading Act approved August 24, 1921, as "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs" (R. 14).

Plaintiff in error purchased and affixed to said instrument two hundred dollars of internal revenue stamps issued by the United States for that purpose, which stamps were purchased from the defendant in error as Collector of Internal Revenue; before purchasing said stamps plaintiff in error informed the said defendant in error that said stamps were being purchased for the purpose of using them in payment of the tax of two hundred dollars ($200.00) imposed by Section 3 of the Future Trading Act, approved August 24, 1921, and further informed said defendant in error that he claimed that said section of said act was unconstitutional, void and illegal, and that he intended to institute an action to recover back the sum so paid for said stamps, and that said payment was made under protest and duress and under compulsion by reason of the penalty and punishment provided in said act for violation thereof (R. 15). Thereafter plaintiff in error duly appealed to the Com-

missioner of Internal Revenue of the United States for the refund of said tax of two hundred dollars ($200.00) upon the ground that said tax was illegally imposed and collected and that said section of said act was unconstitutional and void, which appeal was denied by the Commissioner of Internal Revenue in writing (R. 15) and thereupon this action was instituted.

Members of grain exchanges throughout the United States had, for many years prior to August 24, 1921, the date of the approval of this act, bought and sold in large quantities agreements for contracts for the purchase and sale of grain subject to acceptance within a definite length of time thereafter and at a price specified therein. Those agreements for contracts were commonly known under the name of "indemnities" and are the same contracts and agreements referred to in the Future Trading Act as "indemnities," "privileges," "bids," "offers," "puts and calls," or "ups and downs" (R. 16).

The forms usually used in transactions of this character are set forth at pages 16 and 17 of the record. When the purchaser of an "indemnity" elects to exercise his rights, the grain called for is bought or sold on the exchange named in the agreement, for future deliverty as provided in the agreement (R. 17).

It is specifically stipulated that the purchaser of such an "indemnity" does not in the first instance buy or sell the grain covered by the contract but merely buys an agreement for the purchase or sale of such grain with the right to accept the offer within the time specified therein (R. 17).

The uniform consideration or price paid for such contracts, whether the time specified therein was one day or longer, was on August 24, 1921, and for many years prior thereto, one dollar ($1.00) per thousand bushels (R. 17). By far the largest percentage of such indemnities were sold subject to acceptance by close of market on the following day at a price ordinarily within one-fourth to three-fourths of a cent per bushel of the close of the day's market, although at times of unusually great fluctuations the price named may be as much as one cent and in rare cases as much as two cents from the closing market price, and when made for acceptance for a longer period they were generally made for a period of the calendar week at a price within two cents to five cents per bushel of the current market; contracts for longer periods constituted a small percentage of the total trade (R. 17).

When the purchaser of a contract of the character described in Section 3 of the aforesaid act elects to exercise the privilege which he has purchased, the transaction can be carried out and performed, and was previous to August 24, 1921, carried out and performed only through and by members of those exchanges upon which sales for future delivery were made (R. 17-18).

As stated before, the transaction in question was a contract between two citizens of the State of Kansas, and if the contract had been consummated by the election of the other party thereto, a purchase of grain for future delivery would have been made upon the Chicago Board of Trade, and subject to its rules, and said purchase would have been made upon the exchange floor of

said Board of Trade between two members of said exchange, one acting for the buyer and one for the seller, and in said transaction both parties to the contract are and would be required by the rules of said Board of Trade to be personally present, and upon which delivery could only be made by ringing out under the customs or rules of said Board of Trade or by delivery of warehouse receipts covering grain stored in warehouses in the State of Illinois, and there held for the purchaser (R. 18).

ERRORS RELIED UPON.

That the District Court erred:

1. In entering judgment in favor of the defendant in error, Noah Crooks, Collector of Internal Revenue of the Sixth District of Missouri, in that the agreed statement of facts, which stand as a special verdict in the case, is insufficient to support a judgment in his favor in that Section 3 of the said Future Trading Act is a regulation of intrastate commerce and interferes with the right of the several states to provide for and regulate the making of contracts with regard to intrastate transactions within the respective states in violation of the Tenth Amendment to the Constitution of the United States.

2. In holding that plaintiff in error could not recover from the defendant in error, Noah Crooks, Collector of Internal Revenue, said stamp taxes against the claim of plaintiff in error that said Section 3 violated Section 8 of Article 1 of the Constitution of the United States and the Tenth Amendment thereto in that the purported taxes imposed thereby have no reasonable relation to the taxing power of Congress, and were not levied either to pay the debts or provide for the common defense or general welfare of the United States, but for the sole purpose of forcing dealers in grain and grain exchanges and their members to submit to regulation by compelling them to desist from dealing in "indemnities," "privileges" "bids," "offers," "puts and calls," and "ups and downs" under the penalties of the ex-

treme and exorbitant purported tax and the criminal prosecution provided in said Act.

3. In refusing to declare the law as requested by the plaintiff in error that the purported tax is so exorbitant as to show that it is a penalty and not a tax within the powers granted to Congress under Section 8 of Article I of the Constitution of the United States and is a violation of the Tenth Amendment to the Constitution.

4. In refusing to declare as requested by the plaintiff in error that said Section 3 is a direct interference with the police power of the several states, which is prohibited under the Tenth Amendment to the Constitution.

5. In giving of its own motion and over the exception of the plaintiff in error the following declaration of law:

> "The section under which the plaintiff paid the tax in question does not violate the provisions of the Tenth Amendment to the Constitution of the United States."

6. In giving of its own motion and over the exception of the plaintiff in error the following declaration of law:

> "Said Section 3 of said act does not violate the provisions of Section 8 of Article I of the Constitution of the United States."

7. In giving of its own motion and over the exception of the plaintiff in error the following declaration of law:

"Although the tax on the transaction of the character described in the plaintiff's petition is two hundred times the amount involved in the transaction itself so that the act is obviously absolutely prohibitive nevertheless it must be held to be valid under the taxing power and is not violative of the Tenth Amendment to the Constitution of the United States."

8. In giving of its own motion and over the exception of the plaintiff in error the following declaration of law:

"The court declares the law to be that in view of the provisions of Section 11 of the act in question, the court must look to the provisions of Section 3 alone in determining whether or not it is regulatory."

9. In giving of its own motion and over the exception of the plaintiff in error the following declaration of law:

"The court declares as a matter of law that under the agreed statement of facts in this case Section 3 is not penal or regulatory in its nature."

SUMMARY OF ARGUMENT.

POINT I.

The contracts referred to in Section 3 do not constitute interstate commerce, and this is shown both from the agreed statement of facts and from the previous decisions of this court dealing with subjects related to future trading in grain and cotton.

POINT II.

This section is not a taxing act, but is a regulation of intrastate commerce.

(A) This is shown from the title of the Act as a whole, which recites that it is for the regulation of boards of trade.

(B) The report of the Committee on Agriculture in submitting this bill to the house, states that it will absolutely wipe out of existence these contracts, and this court can resort to these congressional records to determine the purpose of this section.

(C) The exorbitant character of the tax, considered in connection with the other evidences of the purpose of Congress, as shown by the agreed statement of facts which connects these contracts with future trading on grain exchanges which were regulated by the Act, and as shown by the title to the Act and the frank statement in the report of the Committee on Agriculture as to the purpose of this section, all clearly show that the purpose of Congress was to destroy and not to tax, and that the section imposes nothing but a penalty.

(D) Aside from all other questions in the case, the fact alone that the purported tax amounts to 200 times the value of the contract which is the subject of the tax, in and of itself is sufficient to indicate that the purpose of Congress in enacting this section was to destroy contracts of this character, and to show that this section has no real relation to the taxing power of the Federal Government.

(E) Section 11 of the Act, which provides that any provision shall be held valid, notwithstanding any other provisions are held invalid, cannot change or alter the purpose of this section, inasmuch as the question to be determined here is not whether the section should be considered as complete when standing alone, but whether it was passed with the purpose of prohibiting the making of these contracts.

ARGUMENT.

POINT I.

The contracts specified in said Section 3 do not constitute interstate commerce.

The contracts or agreements with reference to which Section 3 of the act in question deals, are agreements under which the party purchasing obtains the right to receive at his option a contract for future delivery. If the purchaser of such a contract elects to exercise his option, grain is bought or sold for future delivery, as the case may be, on the exchange named in the agreement (R. 17).

If the contract in question had been consummated by the election of the other party thereto, a purchase of grain for future delivery would have been made upon the Chicago Board of Trade. This purchase would have been made between two members of the exchange, one acting for the buyer and one for the seller, and both parties to the contract are and would be required by the rules of said Board of Trade to be personally present, and delivery thereon could only be made by ringing out under the rules or customs of said Board of Trade or by delivery of warehouse receipts covering grain stored in warehouses in the State of Illinois, and there held for the purchaser.

Therefore, in the first instance, even if the contract for the purchase of an "indemnity" was entered into between a citizen of one state and a citizen of another state, there would be no element of interstate commerce. The consummation of such a contract by delivery of the "future" would not be interstate commerce.

In *Hill* v. *Wallace*, 259 U. S. 44, this court had under consideration this act other than Section 3. It is there said in the opinion by Mr. Chief Justice Taft:

> "There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of off-setting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.
>
> In *Ware and Leland* v. *Mobile County*, 209 U. S. 405, it was held that contracts for the sales of cotton for future delivery which do not oblige interstate shipments are not subjects of interstate commerce, and that a state tax on persons engaged in buying and selling cotton for future delivery was not a regulation of interstate commerce or beyond the power of the state.
>
> It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce."

The question of whether contracts for future delivery of cotton and grain were interstate commerce was fully considered in the case of *Ware and Leland* v. *Mobile County*, 209 U. S. 405. And although it was shown in that case that in some instances shipments were made between states, it was held that inasmuch as there was no contractual obligation so to do and there was not necessarily any movement of commodities in interstate traffic, these contracts were not subjects of interstate commerce. In the opinion by Mr. Justice Day it is said:

> "But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the

foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

POINT II.

This section is not a taxing act, but is a regulation of intrastate commerce.

It is the contention of the plaintiff in error that this section does not impose a tax, but that it is regulatory or penal in its character, and that this is shown from a consideration of the entire Act and its title, as well as from the exorbitant nature of the tax imposed.

When this court had under consideration the case of *Hill* v. *Wallace*, 259 U. S. 44, the court after quoting Section 3 said:

> "This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling or offer full opportunity for it and does not seem to be associated with Section 4. Such a tax *without more* would seem to be within the

congressional power. *Treat* v. *White,* 181 U. S. 264; *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363. But these are questions which *are not before us* and upon which we wish to express no definite opinion" (Italics ours).

That case was heard upon a demurrer to the petition. As stated by the court the question of the constitutionality of Section 3 was not deemed to be before the court and was not decided. But what difference in principle can there be? Each is regulatory but in a different degree, and either is an invasion of the reserved powers of the states. And the opinion expressed *obiter* and quoted above was specifically limited by this court to an expression as to the apparent constitutionality of this section when the provisions for the tax *without more* were before the court.

Under the agreed statement of facts the true nature of this purported tax is demonstrated.

In proceeding with its purpose to regulate grain exchanges, Congress by Section 3 eliminated entirely one class of contracts by making a prohibitory tax without attaching any conditions thereto. In Section 4 they levied a tax which was proportionately much less enormous, but which was nevertheless sufficiently burdensome so that, if enforced, the grain exchanges would be compelled to submit to regulation. The tax imposed in Section 4 was with reference to sales of grain and was a tax of fifteen to fifty per cent as pointed out in the opinion in *Hill* v. *Wallace.* The tax in this case is twenty thousand per cent.

In the District Court it was argued in effect that there was a distinction between destruction and regulation. In effect, by the imposition of the taxes laid under Sections 3 and 4 of this Act, Congress said to the grain exchanges. "You can not deal in 'indemnities' at all and you can deal in futures only if you submit to regulation."

(A) The Title of the Act.

The title of this Act states that its purpose is the regulation of boards of trade. The title is as follows:

> "An act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes."

The phrase "options for such contracts" used in the title shows that Congress knew that "indemnities" were options for contracts for the sale of grain for future delivery, and that they, therefore, were dealing with two closely related forms of contract. In *Hill* v. *Wallace*, *supra*, reference was made to the title of the act, the court saying:

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the secretary of agriculture and the use of an administrative tribunal consisting of that secretary, the secretary of commerce, and the attorney-general. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade."

Again the court said:

> "When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

Of course, the court was only considering at that time those regulatory features covered by the provisions of the Act with reference to compulsory supervision. But the title is just as much the title to Section 3 as to any other part of the act although the regulation imposed by the tax under Section 3 imposed complete prohibition instead of compulsory supervision.

It is well settled that the title of an act should be considered in determining the intent and purpose of the legislature.

In *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 462, Mr. Justice Brewer said:

> "Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning. * * * Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

(B) The history of the act as shown by the Congressional Record.

By Section 3 Congress proposed to destroy this form of activity upon grain exchanges. This is shown

by the history of the bill and specifically by the report of the Committee on Agriculture submitted by Mr. Tincher which states as follows:

> "This measure will absolutely wipe out of existence the practice of 'puts' and 'calls,' 'ups' and 'downs,' and 'indemnities' " (Vol. 1, House Reports, 67th Congress, 1st Session, 1921, Ser. No. 7920).

It is well established law that this court has the right to take judicial notice of reports of committees having bills in charge as well as the debates in congress to determine the purpose of an act.

In *Jennison* v. *Kirk,* 98 U. S. 453, 25 L. Ed. 240, Mr. Justice Field quoted at length from a speech of the author of the act in question, as printed in the Congressional Globe.

He then said:

> "These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of congress in the passage of the act."

In *Church* v. *The United States,* 143 U. S. 457, 36 L. Ed. 226, Mr. Justice Brewer used the following language:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks

> at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

He then proceeded to examine the congressional committee reports, and the testimony presented to the Committees in Congress, citing the Congressional Record.

In conclusion Mr. Justice Brewer said:

> "We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

In *Shallus* v. *The United States,* 162 Fed. 653, we find the following language:

> "The purpose of Congress (and to ascertain it we are entitled to consider its records and debates upon the subject), it is manifest, was to protect, and not prohibit; to raise revenue, and not cut off revenue; to promote legitimate business, and not destroy it."

In *Wadsworth* v. *Boysen* (*C. C. A.*), 148 Fed. 771, the court said:

> "On the contrary, if resort is to be had to extraneous matters, the debate in Congress, of which the court can take judicial notice, when the proviso in question was under consideration and adopted, clearly shows that it was predicated of the sense of that body, based upon the information presented to the committee having the measure in charge."

In *Blake* v. *The National City Bank of New York,* 23 Wall. 307, 23 L. Ed. 119, the court examined, and in its opinion quoted from the Journal of the House of Representatives and from the Congressional Globe in construing a revenue act, in accordance with what it determined to be the intention of Congress.

In *United States* v. *Chicago & N. W. Ry. Co.,* 157 Fed. 616, the District Court, relying on *Mosle* v. *Bidwell,* 130 Fed. 334, said:

> "While the court in construing the law may not inquire what individual members of Congress supposed the bill to mean, it may consult the history of the act, and the reports of the committees having it in charge."

In *New York Indians* v. *The United States,* 170 U. S. 1, 42 L. Ed. 927, the Supreme Court, speaking through Mr. Justice Brown, held that documents emanating from the Executive and Legislative Departments of the Government may be judicially noticed on appeal, although they were not incorporated in the findings of the court below.

In that connection, the court said:

> "While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, the statutes, records, or public documents, which were not called to its attention, or other similar matters of judicial cognizance."

The court then proceeded to examine and to quote from the records of the thirty-eighth and fortieth Congresses.

(C) The exorbitant character of the tax considered in connection with the other evidences of the purpose of Congress.

This is not a tax upon a sale of grain because these contracts are not sales or purchases of grain; it is a tax upon the making of a form of unilateral contract commonly known as an indemnity, and the tax is required to be paid in the language of Section 3 of this act, "whether the actual commodity is intended to be delivered or only nominally referred to." *The thing that is purchased is the contract,* and this is specifically stipulated in the agreed statement of facts, wherein it is said:

> "The purchaser of such an indemnity does not, in the first instance, buy or sell the grain covered thereby, but merely *buys an agreement* for the purchase or sale of such grain at the price stated in such agreement, with the right to accept such offer within the time specified therein" (R. 17).

Again, the agreed statement of facts recites: "For many years prior to the 24th day of August, 1921, members of grain exchanges throughout the United States had *bought and sold* in large quantities *agreements for contracts* for the purchase and sale of grain subject to acceptance within a definite length of time thereafter, and at a price specified therein, which agreements for contracts were commonly known under the name of 'indemnities' and are the same contracts and agreements referred to in said Future Trading Act as 'indemnities,' 'privileges,' 'bids,' 'offers,' 'puts and calls,' or 'ups and downs'" (R. 16).

The tax is merely measured by the number of bushels referred to in the contract; in this respect the

tax levied under section 3 differs from the tax levied under section 4, wherein the tax is levied upon the "Contract of sale for future delivery." In a sale for future delivery the consideration is the entire purchase price of the grain. Here the consideration is only the price of the option and that option is taxed regardless of whether any enforcible contract or sale is ever made and was ever intended to be made.

The uniform consideration for the purchase of such a contract was $1.00 for each thousand bushels of grain referred to therein; the tax per thousand bushels is $200.00; therefore, the tax is two hundred times the entire consideration for a purchase of a thousand bushel indemnity contract, or 20,000 per cent. Even if it be contended that the enormity of this tax standing alone would not justify the court in declaring the act invalid, we submit that this fact, when taken in conjunction with the considerations heretofore advanced, definitely shows that in imposing this tax, Congress was attempting to make a specific regulation in respect to one form of activity upon or directly connected with the grain exchanges and thereby regulate intrastate commerce.

When confronted with such a startling tax, it is only reasonable to suppose that Congress intended the natural consequence of its act, and it would seem to be proper for the court to look to the attendant circumstances. When this is done, we find the specific declaration from the chairman of the committee on agriculture having this bill in charge in the House of Representatives, which we have quoted above, that this measure will absolutely wipe out of existence the practice of "puts"

and "calls," "ups" and "downs," and "indemnities;" we find the title of the bill specifically stating the purpose to regulate boards of trade; we find in the very next section a tax of fifteen to fifty per cent, which this court has held in *Hill* v. *Wallace, supra,* was imposed for the purpose of regulating boards of trade; and we find from the record in this case that the enforcement of this section will directly regulate boards of trade by prohibiting these contracts from being carried out or dealt in upon them. We further find that these contracts are so interwoven with contracts for future delivery, and so directly connected therewith, that the conclusion is irresistible that the purpose of Section 3 is so connected with the purpose of Section 4 that the tax must inevitably be declared invalid.

As bearing on the necessary connection between Section 3 and those other regulatory provisions held invalid in *Hill* v. *Wallace, supra,* the language used in *Wolff Packing Company* v. *Court of Industrial Relations,* 45 Supt. Ct. Rep. 441, is directly in point. It is there said in the opinion by Mr. Justice Van Devanter:

> "The authority which the act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration, and has no separate purpose. It was exerted by the state agency as a part of that system, and the state court sustained its exertion as such. As a part of the system, it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider for that was not done."

We submit, therefore, that this case comes within the principles laid down in *Hill* v. *Wallace, supra,* and other cases recently decided by this court.

In *Hill* v. *Wallace,* 259 U. S. 44, it was said in the opinion of Mr. Chief Justice Taft:

> "Our decision, just announced, in *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, *ante,* 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449, involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like *Veazie Bank* v. *Fenno,* 8 Wall. 533, 19 L. Ed. 482, and *McCray* v. *United States,* 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation."

In *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, it is said in the opinion by Mr. Chief Justice Taft:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citi-

zens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them.

and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard.

The case before us cannot be distinguished from that of *Hammer* v. *Dagenhart,* 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

'In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states—a purely state authority.'

In the case at the bar, Congress, in the name of a tax which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and un-

limited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, 4 L. Ed. 579, 605, in a much-quoted passage:

'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not in the law of the land.' "

In *Hammer* v. *Dagenhart*, 247 U. S. 251, it is said in the opinion by Mr. Justice Day:

"A statute must be judged by its natural and reasonable effect. *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, 43 L. Ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (*United States* v. *Ohio Oil Co.*) 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The

maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101, 104. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. *New York* v. *Miln*, 11 Pet. 102, 139 9 L. Ed. 648, 662; Slaughter-House Cases, 16 Wall. 36, 63, 21 L. Ed. 394, 404; *Kidd* v. *Pearson*, *supra*. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in

> interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated and thus our system of government be practically destroyed."

In *Keller* v. *United States*, 213 U. S. 138, it was held that Congress had no power to punish the harboring for purposes of prostitution, an alien woman within three years after her entry into the United States. Such encroachment on the police powers of the states, it was held, did not come under the power of the United States as to immigration.

Mr. Justice Brewer there said:

> "Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and rea-

> sonably enforced. *Fairbank* v. *United States*, 181 U. S. 283, 56 L. Ed. 862, 21 Sup. Ct. Rep. 648. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237, that 'the Constitution, in all its provisions looks to an indestructible Union, composed of indestructible states.' "

In *Linder* v. *U. S.*, 45 Sup. Ct. Rep. 446 (1925) in construing the Harrison Narcotic Act, Mr. Justice McReynolds said:

> "The declared object of the Narcotic Law is to provide revenue, and this court has held that whatever additional moral end it may have in view must 'be reached only through a revenue measure and within the limits of a revenue measure.' *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, 60 L. Ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced. * * *
>
> Obviously, direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

And so in *Henderson* v. *Wickham*, 92 U. S. 259, this court in the opinion of Mr. Justice Miller said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In *Pollock* v *Farmers' Loan & Trust Co.*, 157 U. S. 429, l. c. 581, in discussing the principles of constitutional construction, Mr. Chief Justice Fuller said:

> "If it is true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. *It is the substance and not the form which controls*, as has indeed been established by repeated decisions of this court."

In *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that a state tax on the occupation of an importer was the same as a tax on imports and therefore void. And Mr. Chief Justice Marshall there said:

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. *It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing.*"

And later on in the opinion, the Chief Justice points out that the same principles of constitutional construction which forbid the states from levying a prohibited tax by varying the form, likewise apply to similar attempts of Congress. For on page 445, he said:

> "The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the Legislature had a right to tax occupations."

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, Chief Justice Fuller, in discussing the power of a state to tax interstate business, said:

> "The substance and not the shadow determines the validity of the exercise of the power."

In *Fairbanks* v. *The United States*, 181 U. S. 294, it was said in the opinion by Mr. Justice Bower:

> "That what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."

In *Mugler* v. *Kans.*, 123 U. S. 623, Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under the solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

It was argued in the court below, and may be argued here, that there are considerations affecting the public welfare or the public morals, which should have

a bearing upon the determination of this case. And it was suggested in *Hill* v. *Wallace, supra,* that these contracts offered favorable opportunities for gambling.

But the matter of the public welfare cannot justify an invasion of the reserved powers of the states. This was clearly indicated in the opinion in *Hammer* v. *Dagenhart, supra,* and was also laid down in the case of *Linder* v. *United States,* 45 Sup. Ct. Rep. 446. The fact that moral considerations entered into the decisions in the lottery cases presents a very different consideration. Thus, in *Champion* v. *Ames,* 188 U. S. 321, the decision is based on the fact that Congress was dealing with the subject of interstate commerce, and in regulating interstate commerce it was held proper to provide that it should not be polluted by the carrying of lottery tickets from one state to another, and it was particularly pointed out in the opinion by Mr. Justice Harlan that "the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution."

Besides, there is nothing in the record in this case which presents the question of the facility for gambling, and if the smallness of the consideration of these contracts might be deemed as indicating that they could be readily used for that illegal purpose, it can equally be seen that the smallness of this consideration permits these contracts to be used for the legitimate purpose of "hedging," or protecting, dealers in grain who have offered to buy or sell grain at distant places, and who

might otherwise be subjected to heavy losses by means of sudden heavy market fluctuations. Thus it can be readily seen that an exporter who has offered wheat abroad, or a terminal dealer who has sent bids to the country for the purchase of wheat, can insure or *indemnify* himself against more than nominal difference in the market by purchasing *indemnities* good until the close of market on the next day.

D. The exorbitant amount of the levy is sufficient alone to clearly show that it is not a tax.

There is no instance in the reported decisions of a tax even remotely approaching the towering proportions of the tax in this instance. A tax of 50% maximum was considered to be most burdensome in *Hill* v. *Wallace*, but a tax of 20,000% staggers credulity, and even stretches the imagination beyond the breaking point.

This question is squarely presented by the declaration of law given by the trial judge of his own motion as follows:

> "4. Although the tax on the transaction of the character described in the plaintiff's petition is two hundred times the amount involved in the transaction itself so that the Act is obviously absolutely prohibitive nevertheless it must be held to be valid under the taxing power and is not violative of the Tenth Amendment to the Constitution of the United States" (R. 24).

This case, therefore, presents clearly the question as to whether the size of a "tax" may ever be so great that this court can determine from that fact alone that it was intended as a penalty and as such intended abso-

lutely to destroy the subject of the purported tax. For it can scarcely be conceived that a proportionately greater "tax" will ever come before this court.

It cannot be argued here that this is only a tax of the size referred to in *Hill* v. *Wallace*, as being imposed under Section 4 of this Act, because:

(1) Only the contract is here sold, not the wheat, this is expressly stipulated (R. 17), and is the fact;

(2) The tax is measured by the bushels of grain, though it be "only nominally referred to" in the contract;

(3) The grain is only actually bought or sold in that small proportion of cases where the market reaches the designated price.

Whatever interpretation was for many years placed upon the often-quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 317, that "the power to tax involves the power to destroy," it must, we think, be now considered as settled that Congress does not have the right to destroy or regulate by taxation those subjects which it could not so destroy or regulate by direct legislation. *Bailey* v. *Drexel Furniture Co., supra*, and *Hill* v. *Wallace, supra*, have certainly settled that question in definite form.

In *Bailey* v. *Drexel Furniture Co., supra*, the court would clearly appear to have laid down the doctrine that from *the size of the tax alone*, if sufficiently extended, it may lose its character as a tax and become a mere penalty. Thus it is said in the opinion by Mr. Chief Justice Taft:

> "The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. *But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment*" (Italics ours).

Again, in the Bailey case, the court indicates its view as to previous cases wherein taxing acts had been sustained as cases where "there has been ground for *suspecting* from the weight of the tax it was intended to destroy its subject" (259 U. S. 37, l. c.). But here there can be no stopping at *suspicion;* the weight of this "tax" compels the *certainty* that it could have but one purpose, namely, destruction.

McCray v. *United States,* 195 U. S. 27, presented no more than a "suspicion" that its purpose was to destroy, and this is well evidenced by the fact that a *considerable number of millions of dollars* of revenue have been collected under that law. *Veazie Bank* v. *Fenno,* 8 Wall. 533, dealt with a law which could be upheld as a protection to the national currency.

The principle for which we are contending was clearly stated by this court in *McCulloch* v. *Maryland*, 4 Wheat. 315, 420, 421, where this court said in the opinion by Chief Justice Marshall:

> "*Let the end be legitimate,* let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. * * * Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or *should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to* the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land" (Italics ours).

The tax on fermented liquors containing over one-half of one per cent of alcohol, was also held not to be a tax, in *U. S.* v. *American Brewing Co.*, 296 Fed. Rep. 772, where it is said, l. c. p. 774:

> "But the so-called tax imposed by Section 608 of the Act of February, 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this. *Helwig* v. *U. S.*, 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614; *Lipke* v. *Lederer*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061; *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318."

In *Helwig* v. *United States*, 188 U. S. 605, 613; 47 L. Ed. 614, the Act of Congress required the collector to appraise imported merchandise, and provided: "And

if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise, a *further sum* equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry."

The court, in an opinion by Mr. Justice Peckham, said:

> "Although the sum imposed by reason of undervaluation may be simply described as 'a further sum' or 'an additional duty,' if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as 'a further sum' or 'an additional duty,' will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature."

In *Lipke* v. *Lederer*, 259 U. S. 557, 561 l. c., Mr. Justice McReynolds said:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. *Child Labor Tax Case, Ante,* 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States,* 188 U. S. 605, 613. Evidence of crime (Sec. 29) is essential to assessment

> under Sec. 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324."

In *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; 43 S. Ct. 152; 67 La. Ed. 318, Mr. Justice McKenna, in referring to the Lipke case, said:

> "The distinction between a tax and a penalty was emphasized. The function of a tax, it was said 'is to provide support of the government'; the function of a penalty clearly involves the 'idea of punishment for infraction of the law,' and that a condition of its imposition is notice and hearing. And even if the imposition may be considered a tax if it have punitive purpose, it must be preceded by opportunity to contest its invalidity. *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127."

In *Union Bridge Co.* v. *U. S.*, 204 U. S. 364, 397, l. c., Mr. Justice Harlan said:

> "If the means employed have no real substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

When the "Hatch Anti-Option Bill" was before Congress in 1892, Senator White, afterwards Chief Justice White, stated in his speech, which will be found in the Congressional Record XXXIII, page 6513 to 6517, inclusive, in part as follows:

"It is perfectly true that in two or three cases the Supreme Court of the United States have said that where on the face of a statute there was the exercise of taxation, as the statute on its face was a taxing statute, the court would not destroy the face of the statute by wiping out the taxing provision in the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the Constitution. Is this not necessarily true?

And after pointing out the distinction between imposts and the power to lay down internal taxes, the Senator said:

"In other words, I contend that where power to destroy exists the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional. This being true, it follows that if the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court of the United States to prevent the usurpation."

The Hatch bill sought to impose a tax of 20c per bushel upon the sale of grain futures and if, in the opin-

ion of Senator White, a tax of that character upon grain futures was void, then much more clearly must a tax of this character be void, which is so great that it staggers the mind to contemplate.

In the lower court the argument was made that tariff acts have been passed which clearly showed inferior motives. But the tariff is a subject matter upon which Congress was granted the direct power of regulation by Art. I, Section 8 of the Constitution. Therefore a tariff regulation is not open to attack on the ground that it is regulatory.

(E) Section 11 of the act has no material bearing on the question as to whether Congress intended this section as a penalty or a tax.

No doubt, the defendant will undertake to lay stress upon the provisions of Section 11 of this act. Section 11 reads as follows:

> "That if any provision of this act or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Provisions of this character are of importance in determining whether different portions of an act are separable, so that one portion may be enforced although another portion is held invalid. But, here, the question is not whether Section 3 is capable of enforcement separate from the other portions of the act, but whether it was enacted in pursuance of the purpose so clearly evidenced by the act to regulate grain exchanges.

If the purpose of Congress was to regulate these intrastate transactions it can make no difference whether Section 3 was enacted in connection with this act or separately. On the other hand in determining the question of purpose, Congress cannot by Section 11 prevent the courts from considering the actual fact that Section 3 is part of this act and enacted under this title.

The Industrial Court Act passed by the State of Kansas, and which was under consideration in the case of *Wolff Packing Company* v. *Court of Industrial Relations*, 45 Sup. Ct. Rep. 441, contains a stronger section than that which is found in the Future Trading Act in reference to the separability of the different sections of the act. This is Section 28 of that act, which reads as follows:

> "Sec. 28. If any section or provision of this act shall be found invalid by any court, it shall be *conclusively presumed* that this act would have been passed by the Legislature without such invalid section or provision and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

This section was not specifically referred to in that decision, although it is set out in the foot note in the earlier case of *Dorchy* v. *State of Kansas*, 264 U. S. 286; 44 Sup. Ct. Rep. 323.

This court, in the opinion by Mr. Justice Van-Devanter, in the Wolff Packing Co. Case, said (45 Sup. Ct. Rep. l. c. 44):

"When the case was first before this court the discussion at the bar and in the briefs chiefly related to the validity of the parts of the act permitting the fixing of wages; and the opinion then delivered particularly dealt with that question, the ultimate conclusion, as expressed therein, being:

'We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the 14th Amendment, and deprives it of its property and liberty of contract without due process of law.'

That conclusion, without more, required a reversal of the judgment of the state court. The parts of the act permitting the fixing of hours of labor were not specially dealt with, and were not affected by the decision, save as the reasons on which it proceeded might be applicable to them. The reversal was with a direction that the case be remanded for further proceedings not inconsistent with this court's decision, and therefore the mandate operated particularly to require that the parts of the act permitting the fixing of wages be regarded as invalid.

In the proceedings which followed the receipt of the mandate, the state court held that the other parts of the act were separable from those permitting the fixing of wages, and also pronounced them constitutional. As the question of separability was a state question, the decision of that court thereon is conclusive here. * * *

On three occasions when the act was before us, we referred to it as undertaking to establish a system of 'compulsory arbitration.'

The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making.

* * * The authority which the act gives respecting the fixing of hours of labor is merely a

> feature of the system of compulsory arbitration, and has no separate purpose. It was exerted by the state agency as a part of that system, and the state court sustained its exertion as such. As a part of the system, it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done."

And so in this case, Section 3 is merely a feature of the system of compulsory regulation of grain exchanges and grain contracts, and has no separate purpose.

But such a section is in any event merely an aid in determining intent and not an inexorable command.

In *Dorchy* v. *State of Kansas*, 264 U. S. 286; 44 Sup. Ct. Rep. 323, the Supreme Court of the United States said in an opinion by Mr. Justice Brandeis:

> "A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. * * * But a provision, inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall. * * * Whether Section 19 is so interwoven with the system held invalid that the section cannot stand alone is a question of interpretation and legislative intent. * * * Section 28 of the Act (which resembles that discussed in *Hill* v. *Wallace*, 259 U. S. 44, 70, 71; 42 Sup. Ct. Rep. 453; 66 L. Ed. 822) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command."

(F) Cases Distinguished.

We wish here to discuss briefly cases which will no doubt be cited by counsel for defendant in error.

Treat v. *White*, 181 U. S. 264, merely decided that 'calls' fall under the classification of 'agreements to sell,' which was contained in the War Revenue Act of 1898. That act was purely a revenue act without more, and levied a tax of two cents on each hundred dollars of face value on sales or agreements to sell shares of stock. The tax was obviously not excessive and was contained in an act passed purely for revenue and not in the slightest degree regulatory. No question was raised or decided as to any alleged invasion of the reserved rights of the states.

Nicol v. *Ames*, 173 U. S. 509, likewise arose under the same War Revenue Act, which assessed on each sale or agreement of sale or agreement to sell merchandise on any exchange or board of trade or similar place, either for present or future delivery for each one hundred dollars in value of said sale one cent, and for each additional one hundred dollars or fraction thereof in excess of one hundred dollars one cent. The tax levied was reasonable beyond question, was unquestionably a tax for revenue, and contained neither in the title or the body of the act any attempt by Congress to regulate intrastate transactions, except the requirement of the making of a memorandum of sale to which stamp should be attached evidencing the payment of the tax; such requirement of a memorandum was, of course, an appropriate means for the collection of the tax, and was in no sense an attempt at regulation.

Thomas v. *United States,* 192 U. S. 363, involves the stamp duty on sales of shares of stock imposed by the same War Revenue Act of 1898. The contention was that such tax was a direct tax and the opinion merely holds that it was an excise tax. Here again the tax was reasonable and none of the questions raised by this writ of error were determined.

It is apparent that none of these cases involved any attempt by Congress, under the guise of a so-called tax, to regulate matters entirely within state control under the Tenth Amendment to the Constitution of the United States. The acts of Congress there considered were but the legitimate exercise of its taxing power on proper subjects; the taxes levied were reasonable and not excessive, and the acts were not in any sense attempts by subterfuge in the form of a purported tax, to regulate matters reserved to the states under our Constitution.

Flint v. *Stone Tracy Co.,* 220 U. S. 107, involved the validity of an excise tax levied on the doing of business by all corporations, joint stock companies, etc., having a capital stock represented by shares, such tax being measured by the net income of the corporations. In the words of Mr. Chief Justice Taft in the Child Labor Tax case, 259 U. S. 20, 42, "there was not in that case the slightest doubt that the tax was a tax, and a tax for revenue, but it was attacked on the ground that such a tax could be made excessive and thus used by Congress to destroy the existence of state corporations."

United States v. *Doremus,* 249 U. S. 86, involved the validity of the Narcotic Drug Act, which imposed a special tax on the manufacture, importation and sale of

opium. As pointed out by Mr. Chief Justice Taft in the Child Labor Tax case, *supra,* "the validity of a special tax in the nature of an excise tax on the manufacture, importation and sale of said drugs was, of course, unquestioned. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax and were therefore held valid. * * * The court, there, made manifest its view that the provisions of the so-called taxing act must be natural and reasonably adapted to the collection of the tax, and not solely to the achievement of some other purpose plainly within state power."

Furthermore, in that case the court in its opinion by Mr. Justice Day points out that the statute purported "to be passed under the authority of the Constitution, Article I, Section 8, which gives the Congress power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States." There was nothing on the face of the act there in question to show that Congress was attempting anything aside from the raising of revenue, and the only serious question in the case was whether or not the provisions confining sales to registered dealers and to those dispensing the drug as physicians had a reasonable relation to the collection of the tax, and it was held that the provisions were a legitimate facility for the collection of the revenue. The court in that case further negatived any intention to hold valid an act interfering with matters committed to the states

under the guise of a so-called tax, for it took the precaution there to say:

> "Of course, Congress may not in the exercise of Federal power exert authority wholly reserved to the states. Many decisions of this court have so declared."

The case of *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 was cited in the court below and extensively quoted. That case arose under the Federal War Time Prohibition Act and the law was upheld on the ground that prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency. It is true that in that case the court founded its reasoning to some extent on the fact that it had been previously held that the states in the exercise of their police power had the right to prohibit liquor traffic even though private property was taken or destroyed without compensation, but this argument was only used to illustrate that in the exercise of an undoubted power by Congress it could likewise take private property without compensation so that in determining that question this court was only passing upon the means which Congress might employ to accomplish a constitutional and lawful end. In this case the purpose of the act is unlawful and unconstitutional.

Spencer v. *Marshall,* 125 U. S. 345, was cited in the lower court. That was a case of a tax imposed under a state law, and it was held that the validity of the tax was not affecteed by the fact that it might be oppressive as that was a question for the legislative branch of the government. But that case involved no question as to

whether the tax was being imposed for a constitutional purpose. And in regard to other cases cited below with respect to taxing statutes enacted by the states it must be observed that the states have both the taxing power and the police power. They have the right and power, both to tax and to regulate. Therefore if a tax is regulatory it is none the less within the constitutional powers of the states.

McCray v. *United States*, 195 U. S. 27, is not decisive of the question here and is distinguished by Chief Justice Taft in the Child Labor Tax Case in the following language:

> "That, like the Veazie Bank Case, was the increase of an excise tax upon a subject properly taxable, in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarin, a substitute for butter. The tax on the white oleomargarin was one quarter of a cent a pound, and on the yellow oleomargarin was first 2 cents and was then by the act in question increased to 10 cents per pound. * * *
>
> In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

Furthermore, the McCray case was a border line case. That the tax was not absolutely prohibitive, is indicated by the fact shown by the records of the Bureau of Internal Revenue, that more than four million dollars in taxes on sales of colored oleomargarin, have been collected under said law during the last five years

alone. We venture to state that the records of the Internal Revenue Bureau will show that the only tax ever collected under Section 3 of the Future Trading Act since its enactment is the tax here sought to be recovered.

Veazie Bank v. *Fenno,* 8 Wall. 533, has sometimes been considered an abrogation by the Supreme Court of its power and duty to declare unconstitutional a purported taxing statute of Congress, even though it be shown that its sole purpose was to regulate or prohibit matters reserved to the states by the Constitution, and not to raise revenue.

But it has more than once been pointed out by this court in subsequent decisions that in *Veazie* v. *Fenno* the subject matter was within the constitutional powers of Congress in protecting the national currency.

In *Edye* v. *Robertson,* 112 U. S. 580, 596 (1884), Mr. Justice Miller said:

> "In the case of *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, the enormous tax of eight per cent per annum on the circulation of state banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

As pointed out by Mr. Chief Justice Taft in the Child Labor Tax Case, *supra,* it was contended that the Supreme Court had "gone so far in sustaining taxing measures, the effect and tendency of which was to accomplish purposes not directly within Congressional power" that the Supreme Court was bound by authority

to maintain the Child Labor Tax Law. And the government in support of such contention cited the Veazie Bank Case. But it was there said:

> "But more than this, what was charged to be the object of the excessive tax was within the congressional authority, as appears from the second answer which the court gave to the objection. After having pointed out the legitimate means taken by Congress to secure a national medium or currency, the court said (p. 549):
>
> 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes, not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.' "

We believe that Section 3 is shown to be a penalty and not a tax, is purely regulatory and beyond congressional power, and, as said in The Child Labor Tax case, the time has come, "in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."

It is therefore submitted that the judgment should be reversed.

Respectfully submitted,

E. R. Morrison,
Counsel for Plaintiff in Error.

APPENDIX.

AN ACT

TAXING CONTRACTS FOR THE SALE OF GRAIN FOR FUTURE DELIVERY, AND OPTIONS FOR SUCH CONTRACTS, AND PROVIDING FOR THE REGULATION OF BOARDS OF TRADE, AND FOR OTHER PURPOSES.

This act shall be known by the short title of "The Future Trading Act."

Sec. 2. That for the purposes of this act "contract of sale" shall be held to include sales, agreements of sale and agreements to sell. That the word "person" shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations and trusts. That the word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

Sec. 3. That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities," or "up and downs."

Sec. 4. That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or

(b) Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times

be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

Sec. 5. That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as "contract markets" when, and only when, such boards of trade comply with the following conditions and requirements:

(a) When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consumed at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such

transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

(e) When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility: *Provided*, that no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such co-operative association.

(f) When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this act.

Sec. 6. That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, that such suspension or revocation shall be final and conclusive unless within 15 days after such suspension or revocation by the said commission such board of trade appeals to the Circuit Court of Appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such a board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such petition is filed shall immediately cause a copy thereof to be delivered to the Secretary

of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the Circuit Court of Appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the Circuit Court of Appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further*, that if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General of the United States, with the right to appeal as provided for in other cases in this section, the deci-

sion on such appeal to be final and binding on all parties interested.

(b) That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this act the provisions, including penalties, of section 12 of the interstate commerce act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this act, and to persons subject to its

provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States Circuit Court of Appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 7. That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as

may have been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

Sec. 8. That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least 90 days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective, the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

Sec. 9. That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of

any person, and trade secrets or names of customers: *Provided,* that nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any person found guilty of violating the provisions of this act under the proceedings prescribed in section 6 of this act: *Provided further,* that the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in co-operation with existing governmental agencies, shall investigate marketing conditions of grain and grain products, and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

Sec. 10. That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per cent of the tax levied against him under this act and shall be guilty of a misdemeanor, and upon convic-

tion thereof be fined not more than $10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution.

Sec. 11. That if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 12. That no tax shall be imposed by this act within four months after its passage, and no fine, imprisonment or other penalty shall be enforced for any violation of this act occurring within four months after its passage.

Sec. 13. The Secretary of Agriculture may co-operate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employes, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved August 24, 1921.

CONTENTS

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 188

H. P. TRUSLER, PLAINTIFF IN ERROR

v.

NOAH CROOKS AND NOAH CROOKS, COLLECTOR OF Internal Revenue for the Sixth District of Missouri

ON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE DEFENDANT IN ERROR

STATEMENT

This action was brought to recover a tax paid under protest, the plaintiff claiming that section 3 of the Future Trading Act (Act of August 24, 1921, c. 86, 42 Stat. 187), under which the tax was collected, is unconstitutional.

That section provides:

> That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or

only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs."

SUMMARY OF ARGUMENT

1. In Hill v. Wallace, 259 U. S. 44, this Court decided that other sections of the Future Trading Act were unconstitutional; but it carefully pointed out that section 3 was not involved in its decision and did not fall because of the invalidity of other sections of the Act.

2. There is nothing in the Future Trading Act which shows that Congress enacted section 3 for any other purpose than to raise revenue. But even if it were proven that Congress intended to enact a destructive tax, that fact would not render the section invalid.

3. Congress may tax to any extent the transactions which it has power to regulate.

4. If Congress determines that an act injuriously affects interstate commerce, it may prohibit that act, even though the effect of the act is not confined to interstate commerce.

ARGUMENT

I

While this court has decided that section 4 and interwoven regulations of the future trading act are unconstitutional, it has expressly said that that decision does not apply to the section of that act which is involved in the present case

In *Hill* v. *Wallace,* 259 U. S. 44, the Court was able to see on the face of the Future Trading Act,

as it had seen on the face of the Child Labor Tax Law, a purpose to enact by means of a tax law detailed regulation of business activities which were not within the control of Congress. The precise scope of the decision should be observed. The Court said (259 U. S. at pp. 66, 67):

> It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. * * * The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. * * * The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all "futures" to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by the commission of violations of these

> regulations, with the withdrawal by the commission of the designation of the Board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

The court then pointed out that the decision in the *Child Labor Tax case* completely covered the case then under consideration (259 U. S. at pp. 67, 68):

> We there distinguish between cases like *Veazie Bank* v. *Fenno,* 8 Wall. 533, and *McCray* v. *United States,* 195 U. S. 27, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the State, with a heavy exaction to promote the efficacy of such regulation. We there say (259 U. S. pp. 37, 38):
>
> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But,

> in the act before us, the presumption of validity can not prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

Having shown that the taxing power did not furnish sufficient justification for the regulations which Congress sought to impose, the Court pointed out (259 U. S. pp. 68, 69) that—

> There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse re-

> ceipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. * * *
>
> It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.

The act contains a saving clause which furnishes assurance that courts may properly sustain separate portions of the act even though other portions should be shown to be invalid. Referring to this saving clause, the Court said (259 U. S. p. 71) that—

> There are sections of the act to which under § 11 the reasons for our conclusion as to § 4 and the interwoven regulations do not apply. Such is § 9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion.

Quoting section 3, the section involved in the present case, the Court added:

> This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling or offer full opportunity for it and does not seem to be associated with § 4. Such a tax without more would seem to be within the congressional power. *Treat* v. *White,* 181 U. S. 264; *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363. But these are questions which are not before us and upon which we wish to express no definite opinion.

The tax imposed in section 3 was imposed *absolutely* upon all transactions of a designated character. As the Court said, it does not seem to be associated with the tax which section 4 imposed *conditionally* upon sales by those who were neither owners of grain nor similarly situated. The condition was compliance with an elaborate system of regulations. It was the effort to enforce those regulations through the alternative of a heavy tax which rendered the tax unconstitutional. On the contrary, the tax imposed in section 3 is absolute. It is not tied up with any collateral regulations whatever. The reasons which led the Court to declare other portions of the Act unconstitutional do not apply to section 3.

In *Hill* v. *Wallace* the attorney for the appellants frankly and properly conceded in his brief (p. 68) that—

> If Section 3, which imposes a prohibitive tax on "puts" and "calls," were in a statute which professed on its face to be exclusively a taxing statute, the decisions of this court would preclude an attack upon its validity.

That section, however, is clearly separable from the unconstitutional portions of the Act, as much so as if it were in a separate Act.

II

There is nothing in the future trading act which shows that Congress enacted section 3 for any other purpose than to raise revenue. But even if it were clearly established that Congress intended that the tax should be destructive, that fact would not render the tax unconstitutional

The title of the Act is:

> An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.

This title covers all of the provisions which are to be found anywhere within the Act. It shows that within the Act are sections relating to taxes and sections relating to regulations. It does not show that section 3 deals with any matter except taxation.

Explanatory statements made by committee chairmen when presenting a bill to either House of Congress can not control the interpretation of a statute when the meaning of its terms is clear to the Court. Such statements are admissible only to solve doubt and not to create it. (*Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 589; *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356.)

It is clear that Congress did not enact section 3, as it did section 4, as a step in the detailed regulation of business activities which are not within the control of Congress. So far as appears in the Act the tax imposed in section 3 is just such a tax as this Court has sustained repeatedly. It appears to be of the same nature as the taxes on sales at exchanges or boards of trade which were sustained in *Nichol* v. *Ames,* 173 U. S. 509, and in *Thomas* v. *United States,* 192 U. S. 363, and on agreements to sell shares of stock, otherwise known as "calls," which were sustained in *Treat* v. *White,* 181 U. S. 264.

The Government does not concede that the Court may properly go outside of the statute and inquire whether the tax is so heavy that the transactions which are taxed can not be undertaken profitably. But it submits that even if it were clearly established that Congress intended that the tax should be destructive in its nature that fact would not render the tax unconstitutional.

This Court has repeatedly decided that if on its face an act of Congress is a taxing statute, the Court may not go further and inquire whether the tax is destructive or seeks to attain other ends than the raising of revenue. The soundness of those decisions was recognized in the *Child Labor Tax case,* 259 U. S. 20, and in *Hill* v. *Wallace,* 259 U. S. 44. In those two recent cases the Court was able to see from the very language of the statutes under consideration that the alleged taxes were mere penalties established in order to enforce compliance with detailed regulations which were laid down in those statutes and which, the Court decided, Congress was without power to enact. It was on that ground, and on that ground alone, that the Court declared the legislation in question to be unconstitutional.

The Court conceded in the *Child Labor Tax case,* for example:

> We must construe the law and interpret the intent and meaning of Congress from the language of the act. * * * If it is a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. (259 U. S. at p. 36.)

There is no expression in those two opinions which is inconsistent with the position taken in *McCray* v. *United States,* 195 U. S. 27, and in the

many authorities there cited in support of the proposition that where there is a lawful power to impose a tax its imposition may not be treated as without the power because of the destructive effect of the exertion of the authority. As the Court said in *Austin* v. *The Aldermen,* 7 Wall. 694, 699:

> The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

(To the same effect are the quotations in *McCray* v. *United States,* 195 U. S. at pp. 56–58, from *Knowlton* v. *Moore,* 178 U. S. 41; *License Tax Cases,* 5 Wall. 462; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Spencer* v. *Merchant,* 125 U. S. 345; *Treat* v. *White,* 181 U. S. 264; and *Patton* v. *Brady,* 184 U. S. 608. See also the opinion of this Court in *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, at 541; and the discussion in Story on the Constitution, secs. 973, 965.)

In the *McCray case* Mr. Justice White answered the contention that because the effect of the tax then considered might be to destroy or restrict the manufacture of the article taxed, the power to levy the tax did not exist, by saying (195 U. S. at p. 59):

> This, however, is but to say that the question of power depends not upon the authority conferred by the Constitution but upon

> what may be the consequence arising from the exercise of the lawful authority.
>
> Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. The proposition now relied upon was urged in *Knowlton* v. *Moore,* 178 U. S. 41, and was overruled.

Later cases have taken the same position. In *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153, 154, this Court said:

> The Constitution imposes only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. * * * The limitations to which [Chief Justice Chase in the *License Tax Cases*] refers were the only ones imposed in the Constitution upon the taxing power. * * * The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others.

In *United States* v. *Doremus,* 249 U. S. 86, 93, it again pointed out that—

> The only limitation upon the power of Congress to levy taxes of the character now under consideration is geographical

> uniformity throughout the United States. This court has often declared it can not add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. * * * Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax cases,* 5 Wall. 462.

And in *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48, 49, dealing with a territorial statute, it said:

> If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a Constitution that has known protective tariffs for a hundred years. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk. *McCray* v. *United States,* 195 U. S. 27. See *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Mugler* v. *Kansas,* 123 U. S. 623; *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482. We need not consider

> whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us. The acts must be judged by their contents not by the allegations as to their purpose in the complaint. *We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like, as in Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64, 72. [Italics ours.]

The reports of the Commissioner of Internal Revenue show that the immediate effect of the legislation which was sustained in *McCray* v. *United States* was to reduce the revenue derived from the sale of oleomargarine from $2,944,492.46 in the fiscal year 1902 to $484,097.45 in the fiscal year 1904, near the end of which year the *McCray Case* was decided. Of the latter sum, only $215,453.28 was derived in whole or in part from the manufacture and sale of colored oleomargarine. Apparently the attention of the Court was not directed to statistics showing that the increase of the rate of taxation upon colored oleomargarine had reduced the revenue from the manufacture and sale of oleomargarine of both kinds more than five-sixths and had correspondingly reduced the sales of oleomargarine. But it was averred, to quote from the Court's statement of the case (195 U. S. at p. 29):

> that to impose upon the colored oleomargarine a tax of ten cents a pound would burden it with such a charge as to render it impossible to make and sell it in competition with butter, and therefore the result of imposing a tax of ten cents a pound on oleomargarine when artificially colored would destroy the oleomargarine industry.

The fact that the tax was prohibitively high did not render it unconstitutional.

Of course, the character of the legislation is shown by the conditions which existed when Congress enacted the statute and this Court sustained it, and not by conditions as they exist at the present time. Twenty years ago butter was much cheaper than it is in 1925, so that a tax of ten cents per pound upon colored oleomargarine was much more effective in driving that article from the market than the tax is at the present time. Moreover, since manufacturers have learned to supply coloring material with each package of uncolored oleomargarine they have secured many customers who would not use the product until it had been colored. But the decision in the *McCray case* was based upon the conditions which existed in 1904, when the tax was nearly but not quite destructive in its nature.[1]

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[1] The tax on oleomargarine colored to imitate butter did not completely stop its sale. It greatly reduced the volume of the business, but the tax still produced a substantial revenue which with the increase in the cost of its competitor, butter, amounted in 1924 to $989,318.50.

By the Act of April 9, 1912, c. 75, 37 Stat. 81, Congress imposed a tax of two cents per one hundred matches upon all white phosphorous matches manufactured and by the same act the exportation of such matches (which could not have been taxed constitutionally) was prohibited and the importation of such matches was also prohibited. Not one cent of revenue has ever been collected under this statute; but its validity has never been challenged in any court.

III

Congress may tax to any extent the transactions which it has power to regulate

The holding in the *Child Labor Tax case* and in *Hill* v. *Wallace* was that Congress is without power to enforce through ostensible exercises of the taxing power compliance with detailed regulations of matters which it is without power to regulate. The Court did not hold that there can never be regulation through the exercise of the taxing power. In other words, the Court did not decide that the power to impose taxes is confined to the raising of revenue. Since a period long preceding the adoption of our Constitution taxes have been laid for the purpose of regulating commerce. There is no expression in the opinions in those two leading cases which casts doubt upon the validity of such taxes.

That taxing statutes may be regulations of commerce is shown by the cases in which this Court has decided that State tax laws which regulated interstate commerce were unconstitutional. The question whether a Federal statute which both taxed and regulated should be classed as a tax or as a regulation would be of importance only where Congress did not have power both to tax and to regulate, or where the legislation originated in the Senate, where bills for raising revenue may not originate (Constitution, Article 1, sec. 7; *Hubbard* v. *Lowe,* 226 Fed. 135), or where the legislation is enforced in a manner which would not be appropriate to both types of legislation. The Future Trading Act originated in the House of Representatives; and the tax imposed in section 3 is doubtless to be enforced in the manner customary in enforcing taxing statutes. Whether that particular section raises revenue or was intended to raise revenue is entirely immaterial if Congress has power to regulate the transactions involved, for regulation through taxation, where the power to regulate exists, has always been recognized in our system of government; and, of course, the power to regulate includes in general the power to prohibit. (*Hoke* v. *United States,* 227 U. S. 308, 322; *Hippolite Egg Co.* v. *United States,* 220 U. S. 45; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492, 493; *The Lottery case,* 188 U. S. 321, 357, 358, 360; *United States* v. *Holliday,* 3 Wall. 407.)

Story on the Constitution says (sec. 973):

> So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustained, that the power to lay taxes is not by the Constitution confined to purposes of revenue. In point of fact, it has never been limited to such purposes by Congress; and all the great functionaries of the government have constantly maintained the doctrine that it was not constitutionally so limited. (See also sec. 970.)

In section 1080 is the statement:

> No one can doubt or deny that a power to regulate trade involves a power to tax it. It is a familiar mode, recognized in the practice of all nations, and was known and admitted by the United States while they were colonies, and has ever since been acted upon without opposition or question.

And in section 965 Story says:

> Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures (citing Hamilton's Report on Manufactures, in

1791); for retaliation upon foreign monopolies and injurious restrictions (citing Jefferson's Report on Commercial Restrictions, in 1793; 5 Marshall's Life of Washington, ch. 7, pp. 482 to 487; 1 Wait's State Papers, 422, 434); for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition and secure a monopoly to the government. (Citing Smith's Wealth of Nations, B. 5, ch. 2, art. 4.)

James Madison discussed the question in two letters to Joseph C. Cabell. (Writings of James Madison, Lippincott ed., vol. 3, pp. 571, 637.) He said (pp. 571, 573):

1. The meaning of the power to regulate commerce is to be sought in the general use of the phrase; in other words, in the objects generally understood to be embraced by the power when it was inserted in the Constitution.

2. The power has been applied, in the form of a tariff, to the encouraging of particular domestic occupations by every existing commercial nation.

3. It has been so used and applied particularly and systematically by G. Britain,

whose commercial vocabulary is the parent of ours. * * *

9. Every President, from General Washington to Mr. J. Q. Adams, inclusive, has recognized the power of a tariff in favor of manufactures, without indicating a doubt, or that a doubt existed anywhere. * * *

11. A construction of the Constitution practiced upon or acknowledged for a period of nearly forty years has received a national sanction not to be reversed but by an evidence at least equivalent to the national will.

It seems clear, therefore, that Congress may tax to any extent the transactions which it is empowered to regulate, even though it may not enforce through ostensible exercises of the taxing power attempted detailed regulations of matters which it is without power to regulate.

IV

If Congress determines that an act injuriously affects interstate commerce it may prohibit that act even though the effect of the act is not confined to interstate commerce

The bearing which such a "call" transaction as was involved in the present case has upon interstate commerce might have been brought out more fully before the enactment of the Future Trading Act had it not been for the fact that on April 28, 1921, Joseph M. Griffin, president of the Chicago Board of Trade, appeared before the Committee on Agriculture of the House of Representatives

and placed in the record a letter received by him in his official capacity from the board of directors of his organization in which that board of directors declared (Hearings before the Committee on Agriculture of the House of Representatives, 67th Congress, 1st Session, on Future Trading, Series C, p. 152):

> It is our firm purpose to prevail upon our membership to so amend our rules as to preclude all transactions in indemnity contracts and at the same time induce other exchanges to follow the same course.

He then pointed out that "indemnity contracts" is the trade name for what are known in the vernacular as "puts" and "calls."

During his testimony the following discussion occurred (pp. 156, 157):

> Mr. TINCHER. Your rule enforced in the Chicago Board of Trade would not prevent the men in Kansas City or St. Louis from indulging in puts and calls; you have no way of forcing them?
>
> Mr. GRIFFIN. None whatever. I may say that following the publication of the report of our directors all of the principal grain exchanges in the country held a meeting—I was not personally present—and they unanimously indorsed the recommendation of our board and agreed in their turn, as soon as may be, to make such amendments to their rules as to make this recommendation operative.

> Mr. TINCHER. Of course, there is need for a law on the subject, because there will always be some outfit of people trying to profit.
>
> Mr. GRIFFIN. Mr. Congressman, I think I speak not only for the Chicago Board of Trade, but for all other exchanges, when I say that we have no objection to a law of that kind, and clearly so, when your bill is simply a vindication of our own judgment.

Other witnesses testified against trading in "puts" and "calls"; but it is not necessary to go into the details of their testimony. This Court in *Hill* v. *Wallace* (259 U. S. at p. 71) correctly described such trading as "transactions in the grain markets which approximate gambling or offer full opportunity for it." It is more objectionable than merely speculative trading. It is the making of bets on fluctuations in the market. Such trading is not speculating but, as this Court aptly said, it is "gambling."

The plaintiff in error insists that "put" and "call" contracts are interwoven with contracts for future delivery. (Brief, p. 26.) The Government does not deny this point. As set forth in the agreed statement of facts (R. 17)—

> When the purchaser of the indemnity elects to exercise his rights, the amount of grain called for in such agreement is bought or sold, as the case may be, on the exchange named in the agreement, for future delivery in the month named in the

> agreement, and the agreement is fully consummated. The grain so bought or sold is not what is commonly known as "cash grain."

In other words, if the purchaser of the "indemnity" is successful, he secures a contract for future delivery of grain. His "put" or "call" agreement is a transaction which is not strictly local in character. It directly relates to the future price of grain in the world's markets. It must give to the professional dealer in such agreements fully as great an incentive to manipulate the market as if he were buying or selling grain directly. Such unilateral "indemnity" contracts no more relate exclusively to intrastate matters than they would do if they were bilateral contracts for the purchase and sale of grain for future delivery in the exchange markets.

It must be conceded that Congress has not expressly set forth the bearing of such agreements between a member of the board of trade and his customer upon interstate commerce as it did with respect to bilateral contracts in grain futures in section 3 of the Grain Futures Act. (Act of September 21, 1922, c. 369, 42 Stat. 998, 999.) The plaintiff in error, however, has shown the close kinship between the transaction to which he was a party and those transactions which, the Grain Futures Act declares, affect interstate commerce even when they are not a part thereof.

" Put " and " call " agreements entered into by a member of a board of trade with respect to the future price of grain do not relate exclusively to intrastate commerce. The same transaction has effect upon interstate as well as upon intrastate commerce. This effect results even though no purchase or sale may follow from such an agreement. In *United States* v. *Ferger,* 250 U. S. 199, this court upheld a Federal statute which punished the forging of bills of lading used in interstate commerce against the contention that Congress could deal only with actual shipments. An act may affect interstate commerce even though not a part thereof.

As this Court said in *Stafford* v. *Wallace,* 258 U. S. 495, 521, and repeated in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 37:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

While the Government submits that if Congress has power to regulate directly it has power to

regulate through the imposition of a tax, not merely by a tax which regulates incidentally but by a tax which is unquestionably imposed primarily for the purpose of regulating, it points out that this case does not involve the question whether a tax imposed with that end clearly in view may be enforced in any other way than that which is usual in the collection of taxes. Protective tariffs are, however, enforced in precisely the same manner as a tariff for revenue only would be made effective. Section 3 of the Future Trading Act was a taxing statute, enforced as such, although the power to tax was supplemented by the power to regulate.

WILLIAM D. MITCHELL,
Solicitor General.

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Special Assistant to the Attorney General.

NOVEMBER, 1925.

SUPPLEMENTAL STATEMENT

The foregoing brief has been prepared and is submitted in an effort to present to the Court the arguments which may be advanced in support of the validity of this statute. This work has been done while laboring under the conviction that the act is invalid.

It is a delicate matter for a court to hold an act of Congress unconstitutional. It would be a still more delicate matter for the Department of Justice by confession of error to attempt to force a judgment of this Court that a statute is invalid. In such a case the Court might well decline to act upon a confession of error and insist upon examining the question for itself. There is in addition the consideration that we may be quite mistaken in believing the statute invalid.

It therefore seems appropriate for the law officers of the United States, without regard to individual conviction, to submit the case for the usual consideration by the Court, and, since the arguments against the validity of the statute are adequately presented by the plaintiff in error, to file a brief in support of the statute.

Our duty to sustain and enforce the acts of Congress does not outweigh the obligation to support and defend the Constitution, and we feel

under no obligation to conceal our opinion that in this case Congress under the guise of a revenue measure which can not produce a dollar of revenue (except that paid to make a test case) has attempted to completely prohibit transactions which it has no power under the Constitution to deal with.

WILLIAM D. MITCHELL,
Solicitor General.

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